

The Unexplored Option: Jewish Settlements in a Palestinian State

David Morris Phillips*

I. Introduction

The withdrawal of Israeli settlers and soldiers from the Gaza Strip, Hamas' recent victory in the Palestinian Authority elections, and the results of the Israeli elections in which the newly-formed Kadima Party received a plurality of the votes have all focused attention upon the fate of Israeli Jewish settlements on the West Bank, the area of the Palestinian Mandate west of the Jordan River that Jordan captured in 1948 and that Israel refers to as Judea and Samaria. In accord with prior campaign pledges, Ehud Olmert, now Prime Minister of Israel and head of the Kadima Party, has announced his intention to cause Israel to withdraw settlements from most of the West Bank and move their inhabitants into larger settlement blocs that Israel intends to retain or into Israel proper. According to this "convergence plan, most settlements, but not settlers, will be removed."¹

* Professor of Law, Northeastern University. This article was presented at faculty seminars at Touro Law School and Northeastern University School of Law. The author would like to thank Darleen Cantelo, Sholom Fine and Stacey Dippong, Northeastern University law students, and Sue Zago, Sharon Persons, Alfreda Russell, Northeastern University law librarians, for their invaluable research assistance. The opinions expressed in the article are the author's, but critical yet constructive comments on earlier drafts by David Kretzmer, John Leubsdorf, Noah Phillips and Dan Subotnik have immeasurably improved it.

¹ Olmert's convergence plan seemingly envisions the retention of settlements presently inhabited by 150,000 to 175,000 settlers, but the removal of the majority in number of the settlements and the movement of between 75,000 to 100,000 settlers, but is otherwise vague on details. See, AP, *Kadima: West Bank withdrawal will take a year to finalize*, HAARETZ, <http://www.haaretz.com/hasen/spages/700253.html> (last updated Mar. 29, 2006). Olmert's post-election declarations and those of his spokespeople accord with both pre-election popular support and Kadima's platform. See, e.g., Editorial, *Not Good Enough*, HAARETZ, Mar. 6, 2006, <http://www.haaretz.com/hasen/spages/690437.html> (urging removal of West Bank settlements); Aluf Benn & Yossi Verter, *Olmert to Offer Settlers: Expand Blocs, Cut Outposts*, HAARETZ, <http://www.haaretz.com/hasen/spages/692632.html> (last updated Mar. 10, 2006) (Acting Prime Minister Ehud Olmert, if Kadima Party forms the next government, intends to remove settlements beyond a certain line, but then to expand settlement blocs within that line); Mazal Mualem, Netanyahu: *Poll is Referendum on Olmert's Pullout Plan*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/692852.html> (last updated Mar. 12, 2006); Nir Hasson & Lilach Weissman, *Peretz: Labor won't Waive on Negotiations for Withdrawal*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/692847.html> (last updated Mar. 11, 2006) (Labor will not withdraw from West Bank unilaterally, but will remove illegal outposts and compensate settlers who leave West Bank voluntarily); Yaakov Katz, *Mofaz presents Israel's final borders*,

Excluding small outposts constructed without permission of the Israeli military administration² and certain disputed neighborhoods within the borders of Jerusalem³, approximately 250,000 Israeli Jewish settlers presently live in approximately 150 settlements on the West Bank.⁴ While the exact amount of territory the settlements occupy on the West Bank is subject to debate, most authorities place that area as less than two percent of the land mass of the West Bank.⁵ In addition to Olmert's convergence plan and Hamas' ascendancy in the Palestinian Authority, the agony that accompanied Israel's Gaza withdrawal⁶ and the continued impetus for

JERUSALEM POST ONLINE,

<http://www.jpost.com/servlet/Satellite?cid=1139395650626&pagename=JPost%2FJPArticle%2FShowFull> (last updated Mar. 22, 2006)(Minister of Defense included Ma'aleh Adumim, settlements in the Jordan Valley, Ariel, Kedumim-Karnei Shomron, gush Etzion, Reiham-Shaked and Ofarim-Beit Aryeh as within the final borders that Israel will set).

² See, generally, Talya Sason, *Summary of Opinion Concerning Unauthorized Outposts*, Mar. 20, 2005 <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Summary+of+Opinion+Concerning+Unauthorized+Outposts+-+Talya+Sason+Adv.htm> (hereinafter, the "Sason Report").

³ A 2004 map prepared by the Washington Institute for Near Policy shows all areas of Greater Jerusalem that fall outside the pre-1967 armistice lines, distinguishing between those areas largely inhabited by Jews, those largely inhabited by Arabs, and those with mixed populations. See <http://www.washingtoninstitute.org/mapImages/41de98e058452.jpg> (last visited Jan. 5, 2006). One of the neighborhoods that falls outside the pre-1967 lines is Gilo, which lies in the direction of Bethlehem and has been the subject of many attacks. See CNN.com, *Bomb kills 19 on Israeli bus*, <http://archives.cnn.com/2002/WORLD/meast/06/18/mideast.violence/index.html> (last visited Dec. 22, 2005). The question of what areas of Jerusalem Israel should retain has now resurfaced, with talk of a "unified Jerusalem" under Israeli sovereignty less current than it had been under the Sharon government. See Nadav Shragai, *No More Talk of Unified Jerusalem*, HAARETZ, <http://www.haaretz.com/hasen/spages/690895.html> (last updated Mar. 7, 2006).

⁴ See Nadav Shragai, *Peace Now: No New West Bank Outposts, But More Settlers in 2005*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/679476.html> (last updated Feb. 2, 2006) (estimate of 250,000 at end of 2005); Mitchell Bard, *Facts About Settlements*, <http://www.jewishvirtuallibrary.org/jsource/Peace/settlements.html> (last visited Jan. 9, 2006) (estimate of 246,000 as of August, 2005); B'Tselem, http://www.btselem.org/English/Settlements/Settlement_population.xls (visited Jan. 9, 2006) (estimate of 232,718 settlers at end of 2004). Note that Palestinians, who characterize many parts of present Jerusalem (e.g., Gilo) as settlements, state much higher figures. See, e.g., EDWARD SAID, *THE END OF THE PEACE PROCESS*, introduction at xiii (2000) ("there are about 350,000 Israeli Jewish settlers on Palestinian land").

⁵ The percentage depends, to a large extent, upon whether the references are to the designated municipal borders of a settlement or the built-up area and whether the reference includes road construction ancillary to the settlement. See *infra* notes 254-58, 279, and accompanying text.

⁶ See Israel Ministry of Foreign Affairs, *Paying the Price for Peace, The Human Cost of Disengagement* Jul. 28, 2005, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israels+Disengagement+Plan+-+Renewing+the+Peace+Process+Apr+2005.htm>. For a pictorial presentation of the agony, see Anat Balint, *Haaretz photographer wins 1st prize in World Press Photo contest*, HAARETZ, <http://www.haaretzdaily.com/hasen/spages/681472.html> (last updated Feb. 11, 2006) and <http://www.haaretz.com/hasen/spages/681483.html> (last updated Feb. 11, 2006). For the difficulty of the Gaza evacuees reestablishing their lives following the evacuation, see, e.g., Raffi Berg, *Israel's 'forgotten' settlers*, BBC News, Nov. 11, 2005, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/middle_east/4442106.stm; Nadav Shragai, *Abandoned Comrades*, HAARETZ, <http://www.haaretz.com/hasen/spages/657298.html> (last updated on Dec. 13, 2005)(describing the unemployment, homelessness, illness and other social problems

establishing a Palestinian state according to the “road map”⁷ – the plan adopted by the United States, the United Nations, the European Union and Russia and accepted by the Palestinian Authority and Israel, with reservations⁸ -- underscore the importance of directly addressing the issue of whether West Bank settlements must be removed in order to resolve the Arab-Israeli conflict.

To some – a group that includes not only Palestinians⁹ and the governments of other Arab nations, but also most members of the European Union¹⁰, much of the American press¹¹, the United Nations General Assembly¹², and, occasionally, even the American government¹³ – the

of the evacuees). See also Dan Izenberg, *Comptroller Slams Gaza Resettlement Failures*, THE JERUSALEM POST,

<http://www.jpost.com/servlet/Satellite?cid=1139395557407&pagename=JPost%2FJPArticle%2FShowFull> (Mar. 7, 2006).

⁷ Israel Ministry of Foreign Affairs, *A Performance Based Roadmap to a Permanent Two State Solution to the Israeli-Palestinian Conflict* (Apr. 30, 2003) (hereinafter, the “Road Map”), available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Performance-Based+Roadmap+to+a+Permanent+Two-Sta.htm>. The Road Map called for the creation of a Palestinian state in certain stages, beginning in Phase 1 with “Ending terror and violence, Normalizing Palestinian Life and Building Palestinian Institutions.” While Phase 1 was supposed to have been accomplished by May, 2003, it has yet to be accomplished. Since its inception, disagreements over the various steps – for example, whether the Palestinian Authority must disband various militant groups before Israel has any obligation to cease settlement construction -- have surfaced. Nonetheless, the specifics of the Road Map have seemed to replace the Israel-Palestinian Declaration of Principles (Sep. 13, 1993) (hereinafter, the “Oslo Agreement”), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm>, resulting from secret negotiations in Oslo between Israel and the Palestinian Liberation Organization, as the primary reference with respect to the mutual obligations of Israel and the Palestinians. resulting from secret negotiations in Oslo between Israel and the Palestinian Liberation Organization, as the primary reference with respect to the mutual obligations of Israel and the Palestinians.

⁸ See *Israel’s Road Map Reservations*, HAARETZ, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=297230> (May 27, 2003).

⁹ See Associated Press, *Palestinian FM: Settlements threaten chance for Palestinian state*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/651888.html> (updated Nov. 30, 2005); Glenn Kessler, *Palestinians get Rare Bush Meeting, Policy Complaints are behind Meeting*, BOSTON GLOBE, Oct. 12, 2005, http://www.boston.com/news/world/articles/2005/10/12/palestinians_get_rare_bush_meeting?mode=PF (last viewed Feb. 25, 2006).

¹⁰ See, e.g., Steven Erlanger, *Europeans Rebuke Israeli Jerusalem Policy*, N.Y. TIMES, Nov. 25, 2005, at A18.

¹¹ See, e.g., Editorial, *Gaza First, But Not Last*, N.Y. TIMES, April 13, 2004, at A24 (late ed.); Editorial, *One Step Back in the Mideast*, N.Y. TIMES, Mar. 23, 2005 at A22; Editorial, *Bush, Abbas Intentions*, BOSTON GLOBE, Oct. 21, 2005, at A16.

¹² See, e.g., A/RES/60/105, 18 January 2006, <http://domino.un.org/UNISPAL.NSF/a06f2943c226015c85256c40005d359c/d28e6c316706c04385257106006ce8ca!OpenDocument> (last viewed Feb. 15, 2006). Other resolutions to the same effect can be accessed at,

<http://domino.un.org/UNISPAL.NSF/vGA!OpenView&Start=1&Count=150&Expand=121#121> (last viewed Feb. 15, 2006). See also Associated Press, *UN slams Israeli settlements, E. Jerusalem separation fence*, HAARETZ DAILY, Dec. 2, 2005, <http://www.haaretzdaily.com/hasen/spages/651888.html>; Richard Schifter, *The First Word: Is the UN Improving?*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1134309585843&pagename=JPost%2FJPArticle%2FShowFull> (updated Dec. 15, 2005).

question hardly merits serious review. Along with the security fence that Israel is constructing and the uncertain meaning of the Hamas victory in terms of the peace process, West Bank settlements are said to constitute *the* major obstacle to a peace settlement. Even commentators and scholars usually considered stalwarts in their defense of Israel¹⁴ and certain American Jewish groups that would define themselves as pro-Israeli¹⁵ decry the presence and expansion of Jewish settlements on the West Bank. Indeed, the liberal left in Israeli politics seems to blame the settlers, for every offense imaginable, including the reality that no peace exists between Israel and Palestinian Arabs.¹⁶ In contrast, to some Israelis, settlements are not an obstacle to but a prerequisite of peace, either because they represent the first line of defense against an Arab attack from the East and/or Palestinian terrorism¹⁷ or because empirically their establishment and growth provided the impetus for serious peace overtures from Palestinian representatives.¹⁸

This article takes a different tack. Israeli settlements, first and foremost, need not be an obstacle to peace for the reason that their location may influence the eventual borders between Israel and a Palestinian state, but need not determine such borders. *Just as Palestinians can and do live within the predominantly Jewish state of Israel, Israeli Jews can live within a predominantly Palestinian nation.* And if this analysis is true, then much of the agony that accompanied the Israeli withdrawal from Gaza and has accompanied recent evacuations of some illegal outposts on the West Bank¹⁹

¹³ See, e.g., US Department of State Daily Press Briefing #180, Wednesday, Dec. 4, 1991, http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1991/9112/180.html (last visited December 22, 2005).

¹⁴ See, e.g., ALAN DERSHOWITZ, *THE CASE FOR PEACE* 13 (2005).

¹⁵ An organization called the Israel Policy Forum fits into this category. See Israel Policy Forum, *Building a Bridge From Disengagement to Two States* at 2-3 (Nov. 2005), available at <http://www.ipforum.org/display.cfm?id=6&Sub=16&dis=7>; Letter from "Prominent American Jewish Leaders" to Condoleezza Rice, Nov. 22, 2004, available at http://www.cephas-library.com/israel/israel_letter_by_prominent_american_jewish_leaders.html See also, Shlomo Shamir, *N.Y. Jewish Leaders Lobbied Rice on Gaza Border Deal*, HAARETZ, <http://www.haaretz.com/hasen/spages/646999.html>

¹⁶ For reflections of this view, see Akiva Elder, *Kadima supporters and the road map*, HAARETZ, www.haaretz.com/hasen/spages/650612.html (last updated, Nov. 28, 2005); Nehemia Shtasler, *The ashes on the prophets' eyes*, HAARETZ, <http://www.haaretz.com/hasen/spages/696534.html> (last updated Mar.21, 2006).

¹⁷ For a reflection of these views, see CNN.com, *Extra! West bank*, <http://www.cnn.com/2005/EDUCATION/08/14/extra.west.bank/index.html> (last visited December 22, 2005).

¹⁸ See Hillel Halkin, *Why the Settlements Should Stay*, COMMENTARY, June 1, 2002, 21-27, at 23.

¹⁹ For descriptions of the difficulty of the recent evacuation of Amona on the West Bank, see Greg Myre, *Settlers Battle Israel's Police in West Bank*, N.Y. TIMES, Feb. 2, 2006, at A1; Jonathan Lis, Amos Harel, Gideon Alon, Lilach Weissman & Nadav Shragai, *B'Tselem to Mazuz: Investigate police violence during Amona Evacuation*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/677685.html> (last updated Feb. 2, 2006) (over 200 protesters and police injured in evacuation of Amona); Bradley Burston,

can be avoided, and negotiations between Israel and the Palestinian Authority to achieve a final settlement made that much easier.

It is useful to begin this exploration with an analogy. Imagine African-American families moving into part of a city exclusively inhabited by whites, acts of terrorism being committed against them by certain persons living within the white community and sellers of the property to African-Americans – having been labeled traitors and “collaborators” – being executed without trial for their act of betrayal against their own community. Imagine, further that the “enlightened” liberal community would blame the African-Americans for their own plight and repeat as a mantra the notion that if only the African-Americans would leave that community, all would be peaceful in race relations. While tragically such opinion was once widely held, it is totally unimaginable that it reflects liberal and enlightened thinking today.

But, the reader might protest, if the African-American hypothetical is meant to suggest that the nearly universal condemnation of Israeli settlements is intellectually inconsistent, the analysis is false.²⁰ It has been argued, for example, that whereas African-Americans, or Jews for that matter, have domestic rights to settle anywhere in the United States, Jews are not a people having any collective rights to settle in Palestine.²¹ This

Brushfire civil war: Israel, the New Enemy of the True Jew, HAARETZ, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=677531&contrassID=2> (last updated Feb. 2, 2006) (“Increasingly, the language of hardline settlers has taken on a note of estrangement, even divorce from institutions of the state, the police, the Supreme Court, the army, the prime minister.... By no means are they representative of settlers as a whole... Theirs is brushfire civil war. But brushfires can take directions and forms which no one can control.”); Nadav Schragai, *Why the Settler Leaders Stayed Silent*, HAARETZ, <http://www.haaretz.com/hasen/spages/677705.html> (last updated Feb. 2, 2006) (referring to the evacuation of Amona, “The ‘consciousness searing’ that settler leaders spoke of so frequently in the months before the disengagement [from Gaza] occurred yesterday, five months after the disengagement.”); Jonathan Lis & Gideon Alon, *Olmert Promises that Government will Maintain Dialogue with Settlers*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/678953.html> (last updated Feb. 6, 2006) (reporting on a Jerusalem rally, “The speeches expressed the growing feeling within the religiously observant camp that the justice system discriminates against the right and the settlers.”).

²⁰ One such party who rejects such is W. Thomas Mallison, whose views seem quite infected by a pronounced anti-Israel animus towards Israel as a Jewish state. See W. Thomas Mallison, Remarks at American Society of International Law Proceedings, April 25-27, 1985, Craig Jackson, Reporter, *Israeli West Bank Settlements, the Reagan Administration's Policy toward the Middle East and International Law*, 79 Am. Soc’y Int’l L. Proc. 217, 226 (1987); Sally V. Mallison & W. Thomas Mallison, *Settlements and the Law, A Juridical Analysis of the Israeli Settlements in the Occupied Territories* at 7 (The American Foundational Trust 1982), available at http://www.geocities.com/alabasters_archive/settlements_and_the_law.html (last viewed Feb. 25, 2006).

²¹ *Id.* In fact, Mallison disputes the whole concept of a Jewish people. See W.T. Mallison, *The Zionist-Israel Juridical Claims to Constitute “The Jewish People” Nationality Entity and to Confer Membership in It: Appraisal in Public International Law*, 32 GEO. WASH. L. REV. 983, 987-93 (1964). That position contrasts with his readiness to accept Palestinian peoplehood (see W. Thomas Mallison & Sally V. Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question* at 39-41 (Study prepared and published at the request of the Committee on the Exercise

article seeks to parse out the assumptions that underlie a liberal inclination to place Israeli settlements in a different category than that of a minority wanting to live among members of another group. The position taken is that, subject to certain conditions, the right of Jews to live in historic Palestine is a powerful imperative that cannot be dismissed away because some, or even substantially all, Palestinian Arabs do not want Jewish communities in their midst, any more than the right of African Americans to establish communities in territories inhabited by “whites” should be dismissed in a context of white opposition.

At the core of this position is a fundamental distinction almost universally overlooked in discussions about Jewish settlements²²: *settlements and sovereignty need not be coterminous* – that is, it is entirely possible, at least theoretically, to have both Arab “sovereignty” over lands and Jewish communities within that sovereignty. Part II of this article explores this distinction between sovereignty and settlements in the context of an increasing and necessary realization of the incompatibility of Israeli sovereignty over the West Bank and Israel’s identity as a Jewish democratic state.²³ Part III outlines those arguments, particularly those based upon liberal values, that support the continuation of Jewish settlements on the West Bank even when a Palestinian state is established. Part IV lays out the conditions which must be satisfied for this resolution to occur. In effect, these conditions also respond to those arguments that have been raised against the settlements, including their legal status, and to doubts that might be raised against the viability of settlements remaining in a future Palestinian state.

of the Inalienable Rights of the Palestinian People, United Nations 1979)), a recent Twentieth Century identity as compared with the several millennia concept of a Jewish people. See *infra* note 307, and accompanying text.

David Kretzmer make a more legitimate objection to this analogy based upon the power relationship between the parties. But, of course, the question of power depends upon the scope of the parties and relations considered. In the case of African-Americans, does one consider simply them and their white neighbors or the power of the federal government? In the case of Israelis and Arabs, does one consider not only the Palestinians but also 22 Arab nations hostile to Israel’s existence, or even more, a larger number of other nations that seem automatically to vote for any resolution that would deny Jews a sovereign state equal to those insisted upon by other peoples? See, e.g., U.N. G.A. Res. 3376 available at <http://www.un.org/documents/ga/res/30/ares30.htm> (Nov. 10, 1975), equating Zionism and racism.

²² Seemingly, the sole published party taking exception to this view is the Israeli novelist, Hillel Halkin. See Halkin, *supra* note 18, at 21-7; Hillel Halkin, *Beyond the Geneva Accord*, COMMENTARY, Jan., 2004; Hillel Halkin, *Whose Land? Why the Settlements Should Stay, Making the West Bank Judenrein is no way to Bring Peace*, WSJ.COM, <http://www.opinionjournal.com/forms/printThis.html?id+110001769> (May 29, 2002).

²³ Although Israel does not have a constitution, it has adopted certain “Basic Laws”, one of which, the *Basic Law: Human Dignity and Liberty*, states: “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” See http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Jan. 6, 2006).

II. Sovereignty and Settlements

It is almost universally assumed that Jewish settlements equate to Israeli sovereignty. The nexus between settlements and sovereignty is critically important from both Palestinian and Israeli perspectives. From a Palestinian perspective, because the settlements are scattered over much of the West Bank (even if their actual borders constitute less than 1/50 of its territory), the continuation of Jewish settlements under Israeli sovereignty realistically means Israeli sovereignty over all or substantially all of the West Bank. Even if Israeli sovereignty did not encompass all of the West Bank, it would either, if the settlements were connected to each other or to Israel, preclude a contiguous Palestinian state having sensible borders, or, if the settlements were not connected, nonetheless represent a serious infringement on Palestinian sovereignty. In either case, according to Palestinian sentiment, the settlements would leave little room for other than a Bantustan-type Palestinian state or other self-governing entity. These issues of contiguity and sovereignty are discussed later in this article.²⁴ From an Israeli perspective, if settlements remain and they necessarily implicate Israeli sovereignty, it will become impossible to separate the border of Israel from that of a state of Palestine. The two entities will have become combined. Realistically, then, Israeli sovereignty over settlements eventually means *de jure* or *de facto* Israeli sovereignty over all or much of the West Bank. The inseparability of Israel from a Palestinian state will spell the demise of a two-state solution to the Arab-Israeli conflict, that is, a predominantly Jewish state and a predominantly Arab state living side by side of each other in the territory west of the Jordan River. And none of the various possibilities that flow from this fact favors the continued existence of Israel as a Jewish democratic state adhering to the rule of law. With the exception of fringe elements within the Israeli political spectrum²⁵, even former stalwarts of the settlement movement and the concept of a Greater Israel encompassing all land west of the Jordan have now seemingly recognized this reality.²⁶ Thus, Ehud Olmert, the Prime Minister of Israel

²⁴ For a discussion of the issue of contiguity, *see infra* notes 117-126, and accompanying text; for a discussion of the issue of sovereignty *see infra* note 455, and accompanying text.

²⁵ See Nadav Shragai, *Right-Wing Group Readies to Build 15 New Illegal Outposts*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/659860.html> (updated Dec. 19, 2005) (referring to a group named, "Loyalists of the Land of Israel", that intends to build additional illegal outposts on the West Bank).

²⁶ Belated recognition of this fact led even Ariel Sharon, the prime minister of Israel presently in a coma and one of the champions of the settlement movement during the 1970's through the 1990's, to leave the Likud party, which he had helped to found, and to establish a new party, Kadimah, in November of 2005. Kadimah's platform includes territorial compromise in order to insure "a Jewish and democratic state." *See*

and head of the newly-created Kadima party, has reiterated in various *fora* that Israel “must create a clear border that reflects the demographic reality that has been created on the ground as soon as possible.”²⁷ In the words of Michael Oren, “[a] solid majority of Israelis accept that they cannot continue to occupy the West Bank and Gaza without endangering the moral and demographic foundations upon which the Jewish state is built.”²⁸ To understand this reality and hence knowledgably to discuss the various options concerning Israeli settlements, consider the various possibilities of Israeli sovereignty, either *de jure* or *de facto*, over the West Bank.

One possibility is that over time – due to vastly differential birth rates²⁹ – the Palestinian population will overwhelm and surpass the number

Mazal Mualem, *Kadima Platform Calls for Jewish Majority, Territorial Concessions*, HAARETZ, Nov. 29, 2005, <http://www.haaretz.com/hasen/spages/651003.html>. See also Steven Erlanger, *How Reality Cut Likud's Vision Down to Size*, N.Y. TIMES, Nov. 27, 2005, at 43. See Aluf Benn, *Olmert: Top Priority is to Determine Israel's Borders*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/673922.html> (updated Jan. 24, 2006) [hereinafter *Israel's Borders*].

²⁷ Aluf Benn, *Managing the conflict*, HAARETZ, <http://www.haaretz.com/hasen/spages/677165.html> (last updated Feb. 1, 2006). Aluf Benn, *Olmert: Top Priority is to Determine Israel's Borders*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/673922.html> (updated Jan. 24, 2006); Aluf Benn, *Olmert: Israel Will Separate From Most Palestinians*, HAARETZ, <http://www.haaretz.com/hasen/spages/680081.html> (last updated Feb. 8, 2006) (reporting on Olmert's first interview with the media since assuming his post as Acting Prime Minister, in which Olmert said that Israel “will separate from most of the Palestinian population that lives in the West Bank, and that will obligate us to separate as well from territories where the State of Israel currently is...”); David Ratner, *Olmert: We Will Freeze Spending on West Bank Construction*, HAARETZ, <http://www.haaretz.com/hasen/spages/691248.html> (last updated Mar. 3, 2006); Aluf Benn & David Ratner, *Olmert: If Kadima Wins, We Will Not Invest in Territories*, HAARETZ, <http://www.haaretz.com/hasen/spages/691448.html> (last updated Mar. 8, 2006). See also the sources cited in *supra* note 1.

²⁸ Michael B. Oren, *Hamas Has Won. What's Next?*, WALL ST. J., Jan. 28-9, 2006, at A8.

²⁹ The Israel Central Bureau of Statistics (“ICBS”) reports an Arab Moslem birth rate in Israel of between twice to one and one-half that of Jews during the ten-year period from 1996 through 2005. See http://www.cbs.gov.il/yarhon/c1_e.xls (last visited Jan. 9, 2006). The Arab population of Israel grew from 1,069,400 at the end of 1997 to 1,372,800 at the end of 2005, an increase of 28.37 percent, while in the same time period the Jewish population of Israel grew from 4,701,600 to 5,302,600, or an increase of 12.78 percent. *id.* The latter statistics may show some slight distortion given two factors that might affect the total populations: increase in the Jewish population of Israel resulting from immigration from other countries (a factor that would increase the Jewish population), and lack of consistency in the territory of Israel covered by the statistic (a factor that would increase the total Arab population). For example, Dr. Aziz Haider, a Hebrew University sociologist, claims that the ICBS statistics are distorted by including the Druze on the Golan Heights and the Arabs of East Jerusalem, both of whom are not Israeli citizens. See Lily Galili, *We are More Normal than You Think*, HAARETZ, <http://www.haaretz.com/hasen/spages/685199.html> (last updated Feb. 21, 2006). Haider also believes that the aggregate birth rate reported by the ICBS is misleading, in that the Bedouin in the South have much higher birth rates than Palestinian citizens of Israel who live in the North.

In any event, it is believed that the birth rate of Palestinians on the West Bank exceeds the current birth rate (3 percent) of Israeli Arab Muslims, but accurate figures with respect to the Arab population on the West Bank and birth rates are more difficult to establish and presently subject to enormous dispute among demographers. The Palestinian Central Bureau of Statistics (“PCBS”) conducted a West Bank and Gaza census in 1997, deriving the figure of 2,895,683 Palestinian Arabs in the West and Gaza. Making

of Jews west of the Jordan, its Arab residents will have (as they should) all rights of citizenship, including the right to vote, and Israel will remain democratic but cease to exist as a Jewish state.³⁰ Whether the name remains, “Israel”, or, more likely, is changed to “Palestine” or some other term more palatable to its majority is largely academic. What will certainly change is the Law of Return³¹, and Israel’s core identity as a haven for Jews in a still very much anti-Semitic world³² will cease. In fact, just as Israel’s Jewish majority has from its inception caused the state to adopt and implement an “affirmative action” policy for Jews throughout the world, its dominant Arab population might well adopt and implement its own

certain assumptions, including a birth rate of 4-5 percent, the PCBS projected a Palestinian population (excluding the Arabs in Israel) of 3.83 million by mid-2004. See Bennett Zimmerman & Roberta Seid, *Arab Population in the West Bank & Gaza, The Million and a Half Person Gap*, Study presented at the American Enterprise Institute, Washington D.C. (Jan. 10, 2005) (hereinafter, the “Zimmerman group”), available at http://www.aei.org/events/eventID.990/event_detail.asp (last visited Jan. 25, 2006). The Palestinian projections would have meant that as of the end of mid-2004, there would 2,895,683 Palestinians on the West Bank if one included the Palestinians living in Jerusalem, and 2,685,474 Palestinians if one excluded Palestinians living in Jerusalem from the calculation. B’tselem, in a 2002 document that amounts to a “brief” against the settlements, estimated the West Bank Palestinian population at 2 million. See Yehezkel Lein, *Land Grab Israel’s Settlement Policy in the West Bank* at 95 (B’tselem 2002), available at http://www.btselem.org/Download/200205_Land_Grab_Eng.doc (last visited Jan. 11, 2006). In contrast, adjusting for lower actual birth rates, lower fertility rates, net emigration from the West Bank rather than immigration, alternative counts for a resident population base and internal migration of Palestinians from the West Bank into Israel proper (within the Green Line), the Zimmerman group concluded that, as of mid-2004, the resident-only population of West Bank Arabs (excluding Jerusalem) was 1,349,525. Taking into account the number of Palestinian Arabs in Israel, the same group recently concluded that there is at least a 1.4 million person gap between the PCBS projection and the true Palestinian population in the West Bank and Gaza. The Zimmerman group also concluded that the gap between the Jewish population and the Arab population west of the Jordan was narrowing more slowly than most had initially projected. The Zimmerman study has attracted some support. See, e.g., Nadav Shragai, *Deal with the Demography*, HAARETZ, <http://www.haaretz.com/hasen/spages/690923.html> (last updated Mar. 7, 2006). But other demographers dispute this claim. For example, Sergio Della Pergola of Hebrew University states that the Zimmerman “claim is based on several additional assumptions, such as a drastic decline in the fertility rate of the Palestinians, which has no basis in reality, and the anticipation of a large positive balance of Jewish immigration, which is not in sight in the present circumstances.” See Sergio Della Pergola, *A Question of Numbers*, HAARETZ, <http://www.haaretz.com/hasen/spages/674640.html> (last updated, Jan. 25, 2006). He notes that while original estimates called for a parity between the Jewish and Arab populations by 1910, “the trend of narrowing the Jewish majority [of the population west of the Jordan] until it is lost by 2020 is common to all the scenarios” and the Gaza withdrawal has delayed that reality by perhaps another 20 years. *Id.*

³⁰ See Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT’L L.J. 453, 470 (2003) (“The Israeli government is not and cannot become sovereign over the entire Palestinian population of the West Bank and Gaza without forfeiting the expression of its own self-determination.”).

³¹ The Law of Return gives every Jew the right to automatically acquire Israeli citizenship. See Israel Ministry of Foreign Affairs, *Law of Return 5710-1950*, Dec. 23, 2005, available at http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law_of_Return_5710-1950.

³² See U.S. DEPARTMENT OF STATE, REPORT ON ANTI-SEMITISM: EUROPE AND EURASIA, available at <http://usinfo.state.gov/eur/Archive/2005/Jan/05-93928.html?chanlid=eur> (last visited December 23, 2005); Associated Press, *Britain’s Chief Rabbi: ‘Tsunami of Anti-Semitism’ Sweeping the World*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/664887.html> (updated Jan. 1, 2006); Mortimer B. Zuckerman, *A Shameful Contagion*, U.S. NEWS & WORLD REP., Oct. 7, 2002, at 34.

affirmative action policy favoring the return of all those Arabs claiming some connection to “Palestine” and outright banning the further immigration of Jews, no matter how distressed the latter are in other parts of the world.

The second possibility is for Israel to “transfer” all Arabs from the land west of the Jordan to other places. There is historic precedent for such a move – to take but one example, millions of Germans were “repatriated” to Germany from Eastern Europe after the defeat of Germany and in the immediate aftermath of World War II.³³ Numerous other population transfers have occurred in the Twentieth Century.³⁴ No matter how many supposed “precedents” exist, however, for Israel actively to consider or implement population transfer as a means to retain a Jewish majority if Israel’s sovereignty extended over the entire West Bank would be morally repugnant. It would also clearly violate the first paragraph of Article 49 of the 4th Geneva Convention.³⁵ Although fringe elements of Israel’s political spectrum might seem comfortable with the possibility of transfer, it seems totally incongruous that Israel, of all countries and as a matter of government policy, would in the still personally felt aftermath of the Holocaust engage in one of the practices practiced upon Jews during World War II. Minimally, such an act would serve to transform a heatedly debated historical topic³⁶ –

³³ See Alfred M. De Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT’L L. J. 207, 228 (1975).

³⁴ Many of these exchanges are summarized in Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT’L L. 295 (1995) (hereinafter, “Benvenisti & Zamir”) at 322-24.

³⁵ See *infra* note 157. While this provision applies only in the case of belligerent occupation, it would be a ruse for Israel to end its occupation by annexing the West Bank and then forcibly to transfer its Palestinian residents.

³⁶ The views both ways are summarized in BENNY MORRIS, 1948 AND AFTER, ISRAEL AND THE PALESTINIANS 1-48 (1994)[hereinafter MORRIS, 1948 AND AFTER]. Morris identifies himself, as well as a few other Israeli historians, as a “new historian”, who in an earlier text, took issue with the traditional Israeli view that the refugees left as a result of calls from other Arab leaders to depart for the sake of providing an unobstructed path in their desire to wipe out the nascent Jewish state. In this work, as well as his earlier writing (THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949 (1987)), Morris concludes that “what occurred in 1948 lies somewhere in between the Jewish ‘robber state’ and the ‘Arab order’ explanations.” MORRIS, 1948 AND AFTER. at 17. The work of Morris and other “New Historians” has itself been criticized. EPHRAIM KARSH, *Rewriting Israel’s History*, pp.169-85 in RETHINKING THE MIDDLE EAST (2003). Morris’ own views seem to have evolved. Replying to a distortion of his view by Henry Siegman in The N.Y. REV. OF BOOKS, Morris commented:

In his article, Siegman repeatedly “cited” things I had said—with a consistency of distortion that is truly mind-boggling. Just to give one key example: I most emphatically never stated anywhere that “the dismantling of Palestinian society...and the expulsion of 700,000 Palestinians [were] a deliberate and planned operation intended to ‘cleanse’...those parts of Palestine assigned to the Jews.” Quite the opposite. Had Siegman bothered to read my books, he would have discovered that mainstream (Haganah–Jewish Agency) Zionist policy, *until the end of March 1948*—meaning during the first four months of the war—was to protect the Arab minority in the Jewish areas and to try to maintain peaceful coexistence. Intentions changed only in April, when the Yishuv was with its back to the wall, losing the battle for the roads and facing potentially political and

whether, on the one hand and as Israel contends, most Arabs who became refugees in 1948 left of their own volition, with or without the encouragement of their own leadership and/or of the invading forces of the five Arab nations that attacked Israel or, on the other hand and as Palestinians have contended, as a result of force exercised upon them by Jews -- into firmly accepted doctrine that there was a broad Zionist plan, which indeed was even implemented, to rid the territory west of the Jordan of its Arab inhabitants. While there undoubtedly were instances of force used against Palestinian civilians in the context of the 1948 war, none of them seem to have had the imprimatur of the Jewish Agency or, after the establishment of Israel, its government.³⁷ It would be academic and wholly irrelevant that the present one-sided narrative as to the birth of the Palestinian refugee problem³⁸ pertains to an event half a century ago rather than the present. Equally as important, Israel as a Jewish state would become a pariah not only among other nations of the World – at times, a not wholly outrageous overstatement of Israel’s position as a result of Arab antagonism and increasing world-wide anti-Semitism, often expressed in the guise of anti-Zionism³⁹ – but also among the overwhelming majority of diaspora Jewry⁴⁰.

genocidal pan-Arab invasion. And even then, no systematic policy of expulsion was ever adopted or implemented (hence Israel's one-million-strong Arab minority today). The Arabs have only themselves to blame for the (unexpected) results of the war that they launched with the aim of "ethnically cleansing" Palestine of the Jews. (Contemporary Arab apologists, always full of righteous indignation, conveniently forget this.)

Benny Morris, *Israel: The Threat from Within: An Exchange*, 51 THE N.Y. REV. OF BOOKS, No. 6, April 8, 2004. And even more recently, reviewing the work of ABU SITTA, *ATLAS OF PALESTINE 1948* (2005), Morris writes: “From reading this *Atlas*, the reader will not know that it was the Palestinian Arab onslaught on the Jewish community in Palestine in November to December 1947 that provoked Jewish counter-violence, which then triggered the Arab exodus; and that it was the follow-up invasion of the country by the armies of the surrounding Arab states in May to June 1948 that turned what might have been an ephemeral phenomenon into a still larger tragedy, consolidating and finalizing, as it were, the refugee status of the fleeing communities.” Benny Morris, *Details and Lies*, THE NEW REPUBLIC ONLINE, Oct. 31, 2005, <http://www.tnr.com/doc.mhtml?i=20051031&s=morris103105>.

³⁷ EFRAIM KARSH, *Were the Palestinians Expelled? and The Palestinians and the Right to Return*, in *RETHINKING THE MIDDLE EAST* 127-54, 155-68 (2003).

³⁸ See *supra* note 37, at 127-54.

³⁹ For descriptions of this phenomenon, see ALAN DERSHOWITZ, *Are Critics of Israel Anti-Semitic?*, in *THE CASE FOR ISRAEL* at 208-16(2003) [hereinafter DERSHOWITZ, *ISRAEL*]; Mortimer B. Zuckerman, *Graffiti on History's Walls*, U.S. NEWS & WORLD REPORT, Nov. 3, 2003, at 44-51.

⁴⁰ With respect to American Jews, some indication of this may be surmised by political affiliation. A 2005 Annual Survey of American Jewish Opinion sponsored by the American Jewish Committee listed 54 percent of American Jews as Democrats, and the vast majority of the remainder, 29 percent as independents. Thirty four percent identified themselves as liberal, 29 percent as moderate and only 27 percent as conservative. Nearly one in four American Jews, 23 percent, identified themselves as “distant” from Israel, and over 60 percent of respondents said Israel should be willing to dismantle all or some of the settlements as part of a permanent settlement with the Palestinians. See Annual Survey of American Jewish Opinion, <http://www.ajc.org/site/apps/nl/content3.asp?c=ijIT12PHKoG&b=846741&ct=1740283>

Nor do Arab and Muslim threats to “throw the Jews into the sea”, “wipe Israel off the map,”⁴¹ or, according to one of the many references to Israel and Jews in Hamas’ charter, “implement Allah’s promise ... [to] fight the Jews (and kill them)”⁴² negate or even reduce the moral repugnancy of forced population transfer. While moral systems are frequently based upon the restraint “of self-interest in favor of promoting a reciprocal recognition of rights and interests,”⁴³ negative acts cannot be justified on the basis of “reciprocal intentions”, short of steps necessary to save lives and perhaps property. Neither could one rationalize forced population transfer by noting that continual pressure and persecution forced over 800,000 Jewish refugees to flee Arab countries in the period right before and after the creation of the State of Israel, of which number Israel absorbed more than 580,000 persons.⁴⁴ Again, one would be attempting to use reciprocity – in this case, an asserted population exchange -- as the basis for a negative act not necessary to save lives. Moreover, Israel’s use of Jewish refugees from Arab lands to justify a population transfer of Arabs would be “double dipping”: regardless of why and under what circumstances many Arabs fled the nascent state of Israel in 1948, Israel and its supporters have already made the argument that their numbers were less than the Jewish refugees from Arab countries forced to abandon their properties and flee to Israel shortly thereafter.⁴⁵

A third possibility is equally unpalatable. To include all or substantially all of the West Bank within its sovereignty, Israel could simply deny citizenship and therefore a right to vote to many or all of its Arab residents. Outright denial of citizenship and franchise rights would place

(Dec. 20, 2005). Given the political affiliation of most American Jews and their preference for the dismantling of settlements, the percentage of American Jews feeling “distant” from Israel if Israel adopted a forcible transfer policy to retain the West Bank would rise appreciably from the present percentage and seemingly equal at least the percentage, 60 percent, that favors dismantling settlements. Another indication of some dissociation among American Jews from Israel is the sharp decline (30 percent) in their registration for the upcoming World Zionist Congress. See Daphna Berman, *Drop in U.S. Voter Sign-up for World Zionist Congress*, HAARETZ, <http://www.haaretz.com/hasen/spages/681258.html> (last updated Feb. 19, 2006).

⁴¹ Steven Erlanger, *Israel Wants West to Deal More Urgently with Iran*, NY TIMES, Jan. 13, 2006, at A8 (Mahmoud Ahmadinejad, the president of Iran, has recently called for Israel to be “wiped off the map”).

⁴² The Charter of Allah: The Platform of the Islamic Resistance movement (Hamas), Art. Seven, <http://www.palestinecenter.org/cpap/documents/charter.html> (last viewed Feb. 1, 2006). See also Itamar Marcus, Special Report #27 (December 1, 1999) *The Palestinian Authority’s Beliefs = Hamas’ Charter*, <http://www.pmw.org.il/specprep-27.html> (last viewed Feb. 1, 2006).

⁴³ David M. Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228, n. 107, and accompanying text at 252-3 (1982).

⁴⁴ MARTIN GILBERT, *THE ROUTLEDGE ATLAS OF THE ARAB-ISRAELI CONFLICT* 48 (Routledge, 8th ed. , 2002) (1974).

⁴⁵ See, e.g., ALAN DERSHOWITZ, *Did Israel Create the Arab Refugee Problem?*, in DERSHOWITZ, ISRAEL, *supra* note 39, at 88-9.

Israel in the same camp as South Africa prior to the early 1990's, converting an outrageous analogy⁴⁶ underlying the present divestment efforts on college campuses and among certain Protestant church groups⁴⁷ into an apt similarity.⁴⁸ Again, it would matter not the least that other countries have long employed a modified apartheid, e.g., Japan's treatment of its resident Korean population⁴⁹ or even Lebanon's denial of citizenship and franchise to its "Palestinian" population.⁵⁰

But could the problem be finessed if, at a point where a majority of Israel's population consisted of Jews, it were to enshrine in its political system – for example, by adopting a Constitution -- law that made unchangeable some modicum of political control by Jews, regardless of subsequent population changes? To ensure its status as a safe haven for Jews, Israel would have to enshrine the Law of Return as fundamental, unchangeable law and divide political power so that, irrespective of whether Jews constituted the majority or minority within the land, they would have a sufficient number of parliamentary seats to either retain or significantly share power. Dictatorships, with or without the semblance of a Parliament – do just that. For example, *Alawis*, a small dissident sect originally derived

⁴⁶ The term apartheid is broadly and frequently applied to any measures that Israel takes, including those that are security-related. See, e.g., Greg Myre, *Israel Considers Banning Palestinians on West Bank's Main Roads*, N.Y. TIMES, Oct. 20, 2005, at A10 (Saeb Erekat, the chief Palestinian negotiator, described a possible Israeli road plan in response to attacks on Jewish civilians on West Bank roads as "the official introduction of an apartheid system."); Chris McGreal, *Worlds Apart*, THE GUARDIAN, Feb. 6, 2006, <http://www.guardian.co.uk/israel/Story/0,,1703245,00.html> ("There are few places in the world where governments construct a web of nationality and residency laws designed for use by one section of the population against another. Apartheid South Africa was one. So is Israel.") For criticisms of this view, see Dennis Ross, *Pretoria Calling*, N.Y. TIMES, Oct. 20, 2005, at A27 ("Yasir Arafat loved to equate the Palestinian struggle for statehood with the struggle of South Africans against apartheid, but his was always a false analogy."); HonestReporting Communique, *'Road Apartheid' Debunked*, Oct. 21, 2005; HONESTREPORTING, *Guardian Promotes Apartheid Slur*, Feb. 12, 2006, http://www.honestreporting.com/articles/45884734/critiques/Guardian_Promotes_Apartheid_Slur.asp.

⁴⁷ ALAN DERSHOWITZ, *THE CASE FOR PEACE* 154-55 (2005). See also Rosner's Blog, *Divestment against Israel is back in town*, HAARETZ, Feb. 7, 2006, <http://www.haaretz.com/hasen/pages/rosnerBlog.jhtml?itemNo=680115&contrassID=25&subContrassID=0&sbSubContrassID=1&listSrc=Y&art=1>.

⁴⁸ See DENNIS ROSS, *THE MISSING PEACE* 797 (2004) ("Ehud Olmert ... declared in December 2003 that Israel could not remain in the territories lest it lose its moral grounding and find its Jewish supporters internationally unable to defend an apartheid reality.")

⁴⁹ Hideki Tarumoto, *Multiculturalism in Japan: Citizenship Policy for Immigrants*, 5 INTERNATIONAL JOURNAL ON MULTICULTURAL SOCIETIES (IJMS), 88 – 103 (2003), ISSN 1564-4901, <http://www.unesco.org/shs/ijms/vol5/issue1/art6> ("the myth of homogeneity has long been challenged by the presence of ethnic and national minorities, including ethnic Koreans and Chinese. Ironically, the idea has denied basic human rights to the "Oldcomers" who were Japanese subjects before 1947 and are now permanent non-national residents in Japan, where they were born and educated...").

⁵⁰ See United Nations Integrated Regional Information Networks, *LEBANON: Palestinian Refugees Complain they are Second Class Citizens*, <http://www.irinnews.org/print.asp?ReportID=49326> (last visited December 23, 2005).

from Shiite Islam, controls Syria by retaining substantially all key military and political positions, despite the fact that Sunni Muslims constitute the overwhelming majority of Syria's population.⁵¹ Prior to the recent Iraq War, Sunni Arabs, and, in fact, a smaller clan among them, Tikritis, to which Saddam Hussein belongs, ruled Iraq to the disadvantage of Shi'ia and Kurds who constituted over three-fourths of that country's population.⁵² Even Lebanon, which at times purports to be an Arab democracy, has weighted its political structure so that a Maronite Christian is always its President and, despite their dwindling numbers, Maronites retain significant political and economic powers in a country a majority of whose citizens belong to other groups (Sunni Muslims, Shiites, or Druze).⁵³ Indeed, much of the "world" seems to understand Lebanon's refusal to deny not only voting rights, but any significant economic opportunities to the Arabs that fled Israel on the ground that the granting of such rights would upset Lebanon's delicate "ethnic balance."⁵⁴

The quality of Israel's "democracy", however, is apt not to be judged by Lebanese standards. While differential voting is not uncommon in private organizations -- for example, class voting in American corporate law -- and, as noted, characterizes the political structures of certain other nations, the principle of "one person-one vote" has now become so enshrined in the scheme of Western democracies, no matter how imperfectly implemented, that it is unlikely that Israel could sustain such a transparently anti-democratic ruse for long. The criticism and resultant ostracism that Israel would face would probably not differ materially from Israel's having adopted a political structure that explicitly denied Arabs the right to vote.

⁵¹ See A. Shadid, *Death of Syrian Minister Leaves A Sect Adrift in Time of Strife*, WASH. POST, Oct. 31, 2005 at A1; Mordechai Nisan, *Alawi Tribal Politics and Syria's Future*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1134309631221&pagename=JPost%2FJPArticle%2FShowFull> (updated Dec. 22, 2005) (describing the degree of control, the various personalities, and the ministries controlled).

⁵² See *Confrontation in the Gulf, For the Iraqi Ruler, Variation on a Name*, N.Y. TIMES, Aug. 25, 1990, at 16, available at <http://select.nytimes.com/search/restricted/article?res=F30610FB3B580C768EDDA10894D8494D81> (last viewed Feb. 12, 2006).

⁵³ See Library of Congress Country Studies, *Lebanon, Government and Politics*, <http://www.presidency.gov.lb/presidency/history/after/after.htm> (last viewed Feb. 12, 2006); U.S. Department of State, *Country Note: Lebanon*, <http://www.state.gov/r/pa/ei/bgn/35833.htm> (Aug. 2005) (last viewed Feb. 12, 2006) (President a maronite; prior to 1990, Christians and Muslims shared parliamentary seats in a ratio of 6:5; under the Ta'if Accords, that ratio was changed to 50:50). As of 1987, it was estimated that only 16 % of Lebanon's population was Maronite (see http://www.photius.com/countries/lebanon/society/lebanon_society_maronites.html (last viewed Feb. 12, 2006)), a figure that might well be lower today.

⁵⁴ See Orly Halpern, *Damascus torpedoed Jordan's peace offer*, THE JERUSALEM POST, March 24, 2005, at 1.

If, then, Israel cannot both retain the West Bank and retain its status as both a democratic and predominantly Jewish state that does not discriminate against its minority citizens, Israel cannot retain sovereignty over the West Bank forever. If so, does it not follow automatically that most settlements – especially those not contiguous to the Armistice Demarcation Line established by the 1949 Armistice Agreement between Jordan and Israel, popularly known as the “Green Line,” must be removed in order to permit sovereignty over the vast majority of Palestinian Arabs resident west of the Jordan by an Arab juridical entity?

Contrary to the assumption made by most commentators, academics and policy makers⁵⁵ alike, removal of Jewish settlers from the West Bank (hereinafter, sometimes “removal” or the “removal option”) and the destruction of their settlements is not the only option. Theoretically three others exist: Israeli settlements remain, but Israeli sovereignty pertains only to them and not to other West Bank territory (“partial sovereignty” or the “partial sovereignty option”); a sufficient land swap occurs such that almost all settlements become part of Israel and Arab communities in Israel become part of Palestine (the “land swap option”); and Israeli settlements remain but become part of a sovereign Palestine (“continuance” or the “continuance option”).⁵⁶

The partial sovereignty option is for settlements, wherever they are, simply to remain under Israeli sovereignty.⁵⁷ All remaining land on the West Bank would be transferred to Arab sovereignty. Indeed, Palestinian negotiators themselves have tried to characterize the plan pressed by President Clinton and accepted by Israeli Prime Minister Ehud Barak at the 2000 Camp David Summit as substantially equivalent to the partial

⁵⁵ For example, Amir Peretz, the Labor party chairman, has stated that, if Labor forms the next Israeli government, it would evacuate West Bank settlements that did not fall into Israel’s eventual borders. See Lilach Weisman, Nir Hasson & Mazal Mualem, *Peretz: Settlers who Leave West Bank will be Fairly Compensated*, HAARETZ, <http://www.haaretz.com/hasen/spages/673863.html> (updated Jan. 24, 2006). Ehud Olmert seemingly intends to follow a similar path if Kadima forms the next Israeli government. See Aluf Benn & Lilach Weissman, *Olmert: We Must Separate from the Palestinians*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/679959.html> (last updated Feb. 7, 2006).

⁵⁶ A recent proposal, which was earlier said to become part of Labor’s plank for the next election, would combine the continuance option with a lease arrangement, whereby, although Palestinian sovereignty is agreed upon, the settlement areas, or at least the large blocs of settlements, are then leased back to Israel under a Hong Kong arrangement for a period of 99 years. See Mazal Mualem & Nir Hassan, *Labor to call for leasing settlements from PA*, HAARETZ, <http://www.haaretz.com/hasen/spages/663117.html> (updated Dec. 28, 2005). It does not appear, however, that this idea became part of Labor’s platform. See *supra* note 55.

⁵⁷ For a criticism of this possibility, see Akiva Eldar, *Kadima Supporters and the Road Map*, Nov. 28, 2005, HAARETZ, <http://www.haaretz.com/hasen/spages/650612.html>.

sovereignty option.⁵⁸ This outcome would leave islands of Israeli sovereignty within a much larger geographical area of “Palestine.” Precedents for partial sovereignty do exist, including the limited sovereignty exercised by certain Native Americans in the United States over their reservations⁵⁹, the sovereignty of the Vatican within the larger nation of Italy⁶⁰, the sovereignty of Monaco within the larger nation of France⁶¹, and, historically, the sovereignty status of a nation’s embassy to and in another country.⁶² But to the Palestinians – no matter how small such islands would be (at present, the built-up area of such settlements constitutes less than two percent of West Bank land) – the partial sovereignty option would be seen as an infringement on its own sovereignty. Issues of security and police forces aside, matters of trade, taxation and the like would be outside of any Palestinian say.

A second theoretical option, which has resurfaced recently⁶³, is the land swap option, which would incorporate into Israel almost all of the settlements in exchange for land presently part of Israel. True, substantially all peace proposals, including that of President Clinton at the Camp David summit in the summer of 2000 and the subsequent meeting at Taba in December of that year⁶⁴, incorporate some concept of a land swap, with the largest settlements contiguous to the 1967 borders incorporated into Israel and some Israeli land, usually that in the Negev contiguous to Gaza, incorporated into Palestine. But Uzi Arad, the former head of Israel’s

⁵⁸ See DENNIS ROSS, *THE MISSING PEACE, THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* 668, 691 (2004). This is shown graphically by maps prepared by the Washington Institute for Near East Policy, one depicting the actual proposal tendered to the Palestinians by President Clinton and the other map depicting the Palestinian’s view of the proposal. See

<http://www.washingtoninstitute.org/mapImages/41db110b8ca1f.jpg> (last visited Jan. 5, 2006). See also Benny Morris, *Camp David and After: An Exchange*, 1. *An Interview with Ehud Barak*, THE N.Y. REV. OF BOOKS 42-6 at 44, June 13, 2002, where Barak refutes the contention that his proposal amounted to a Bantustan, and ascribes Arafat’s characterization of his proposal as such to Arafat’s fear of Palestinian reaction to Arafat’s rejection of Barak’s proposal had it been explained truthfully to Palestinians.

⁵⁹ See The Indian Reorganization Act of 1934, 25 U.S.C. § 476 (2005).

⁶⁰ See CIA, *The World Factbook: Holy See (Vatican City)*, available at <http://www.odci.gov/cia/publications/factbook/print/vt.html>.

⁶¹ See *Id.*, *The World Factbook: Monaco*, available at <http://www.cia.gov/cia/publications/factbook/geos/mn.html>.

⁶² See Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Art. 22, Apr. 18, 1961, 23 U.S.T. 3227.

⁶³ See Uzi Arad, *Trading Land for Peace. Swap Meet*, THE NEW REPUBLIC, Nov. 18 & Dec. 5, 2005, at 16-18 (Arad, former Director of Intelligence in the Mossad, is the founding head of the Institute for Policy and Strategy at the Lauder School of Government, of the Interdisciplinary Center, Herzliya); Yoav Stern, *Geographers propose transfer of Israeli Arab Towns to PA*, HAARETZ, <http://www.haaretz.com/hasen/spages/673813.html> (last updated Jan. 23, 2006).

⁶⁴ See *Taba Negotiations: The Moratinos Non-Paper* (January 2001), <http://www.mideastweb.org/moratinos.htm> (last viewed Feb. 12, 2006) (“Both sides accepted the principle of land swap but the proportionality of the swap remained under discussion”).

intelligence agency, has larger ambitions. In order “to increase ethnic homogeneity and to preserve each side’s basic territorial reach,”⁶⁵ land swap proposals of which he writes approvingly would transfer to a Palestinian state not only vacant land, but areas of Israel with large Palestinian and *bedhouin* populations.⁶⁶ He cites a study projecting the Jewish population of Israel to decline to 74 percent in 2050 without a land swap and to remain at 81 percent by performing a land swap.⁶⁷ And, to the degree that Israeli Arabs do not favor a land swap that would result in their communities becoming part of a sovereign Palestine rather than the state of Israel, Arad’s suggestion can be interpreted as favoring land swap regardless of their consent. Moreover, if a land swap on its own did not solve the demographic problem he cites, he would seemingly favor a transfer of Palestinians who are Israeli citizens to Palestinian sovereign territory. However, whether one speaks in terms of a land exchange, a component of which is that Arab villages now part of Israel become part of a Palestinian state, or “population transfers”, even Arad acknowledges that most Israeli Arab citizens – irrespective of their increasing nationalist identity as Palestinians⁶⁸ -- wish to remain citizens of Israel. The rebuke to this proposal has been fast in coming. Arik Carmon, the head of the Israel Democracy Institute that has spearheaded an effort to establish a written constitution, termed “Arad’s arguments ... racist in nature, damaging to human rights – and of course to the foundations of democracy -- ... [and] in contradiction to international norms and ... unrealizable.”⁶⁹ As Carmon opined, “[t]he termination of an individual’s citizenship, according to international law, cannot occur unless he relinquishes it by agreement.”⁷⁰ A similar suggestion by a group of

⁶⁵ Arad, *supra* note 63, at 16.

⁶⁶ Arad also writes approvingly of a trilateral land swap involving Israel, Palestine and Egypt, again designed for the same demographic and geographic purposes. Arad, *supra* note 63, at 18. The leader of Yisrael Beiteinu, considered a “far-right” party has also reiterated a similar proposal, that is, incorporating Jewish settlements strongholds into Israel in exchange for “areas within the 1967 border populated mostly by Israeli Arabs to be handed over to the PA...” Lilach Weismann & Lily Galili, Lieberman says he’s ready to evacuate his own settlement, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/676593.html> (last updated Jan. 30, 2006). Even former Secretary of State Henry Kissinger seems to advocate a land swap that would involve “territories in present-day Israel with significant Arab populations[, asserting that] [t]he rejection of such an approach, or alternative available concepts, which would contribute greatly to stability and to demographic balance, reflects a determination to keep incendiary issues permanently open.” Henry A. Kissinger, *What’s Needed From Hamas*, WASH. POST., Feb. 27, 2006, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/26/AR2006022601263.html>.

⁶⁷ Arad, *supra* note 63, at 16.

⁶⁸ See *infra* note 453, and accompanying text.

⁶⁹ Arik Carmon, *A Blot on Israeli Democracy*, HAARETZ, <http://www.haaretz.com/hasen/spages/656513.html> (last updated Dec. 12, 2005).

⁷⁰ *Id.*

academic geographers was rejected by Ahmed Tibi, a member of the Knesset from Hadash-Ta'al, as "making its Arab population feel like a rejected enemy..."⁷¹

Unlike the partial sovereignty and land swap options, the latter with or without an additional population transfer of Arabs, only two options – the removal option and the continuance option – do not infringe on Palestinian sovereignty or result in the forced removal of Arabs from the state of Israel in order to retain its Jewish majority and character. Of the two, the removal option is almost universally assumed to be necessary and inevitable, while the continuance option remains overlooked by substantially all commentators.

In sum, Israeli sovereignty over all of the West Bank is incompatible with both Israel's continued status as a democratic Jewish state and the creation of a viable sovereign Palestinian state. That conclusion does not necessarily mean that removal of Jewish settlements is the only option. Concentrations of Jewish and Arab populations should definitely influence the *de jure* border between Israel and a Palestinian state, but they need not dictate sovereignty. If so, the continued presence of Jewish settlements, *per se*, is not an obstacle to the creation of a Palestinian state. Part III explores why their continued presence in a state of Palestine is, at least in theory, a more desirable option than their removal from the territory included in a Palestinian state, while Part IV posits and analyzes the necessary conditions to which this resolution is subject.

III. Reasons in Support of Continuance rather than Removal

The preceding section analyzed the incompatibility between Israeli *de jure* or *de facto* sovereignty over the West Bank and its continued status as a democratic Jewish state. Jewish settlements close to Israel's 1948 armistice lines can be incorporated into Israel consistent with that status, with or without some land swap of unpopulated or sparsely populated Israeli territory in the Negev contiguous to Gaza. But two options remain with respect to other settlements: removal, that is, the destruction of the settlements and the return of their residents to Israel, or continuance, that is, their continued presence in a Palestinian state. This section analyzes why the latter option is preferable.

⁷¹ Yoav Stern, *Geographers Propose Transfer of Israeli Arab Towns to PA.*, HAARETZ., <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=673813> (last updated Jan. 23, 2006).

A. Reversing an exclusionary policy: Jews, too, have the right to live in the historic Land of Israel

In drawing borders between Israel and a Palestinian state, the location of Jewish and Palestinian communities is not irrelevant: while the location of these communities need not determine the borders between the states, they should surely influence those borders. The great bulk of Jews living West of the Jordan should be within the borders of Israel, just as the great bulk of Arabs should be within an Arab juridical entity. From Israel's perspective, that proposition follows from Israel's basic identity: it cannot serve as a "homeland" for Jews – especially Jews oppressed in other countries – unless it is predominantly Jewish. The same holds true for a future Arab juridical entity – it too must be predominantly Arab. Otherwise, the very desire for political rights that drives the Palestinian political struggle would be thwarted.

But complete separation is impossible. Israel will always include minorities and, as should be the case, strive for inclusion of those minorities on a non-discriminatory basis. This proposition follows from Israel's identity not only as Jewish state, but a democratic one. Approximately 20 percent of Israel's present population is Arab.⁷² Arab political parties do exist⁷³, Arabs belong to larger Israeli parties, especially Labor⁷⁴, and Arabs serve in the Israel parliament, the *Knesset*,⁷⁵ some of whom voice views quite antagonistic to the very existence of Israel.⁷⁶ Arabs have served on the

⁷² J. Post Staff, *Population on Eve of 2006 Stands at 6,986,300*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1135696353179&pagename=JPost%2FJPArticle%2FShowFull> (Dec. 28, 2005) (the Central Bureau of Statistics report a population of Israel at the end of 2005 of 6,986,300 people, of whom 76% are Jews, 20% are Arabs, and 4% are non-Arab Christians.).

⁷³ E.g., Hadash-Ta'al, National Democratic Assembly, and United Arab List. See Knesset English Homepage, http://www.knesset.gov.il/mk/eng/MKIndex_Current_eng.asp?view=1 (last visited December 24, 2005). See also Yoav Stern, *Two Parties, and No More*, HAARETZ, <http://www.haaretz.com/hasen/spages/680069.html> (last updated Feb. 8, 2006) (describing both the differences between the three Arab parties represented in the Knesset and the necessity for Arab representation in the Knesset).

⁷⁴ For example, two present Arab Knesset members representing Labor are Raleb Majadele and Saleh Tarif. However, a recent poll indicates that 20.6 percent of Israeli Arabs will vote for predominantly Jewish parties, with a plurality of those voters intending to vote for Kadima, the newly formed centrist party now headed by Acting Prime Minister Ehud Olmert. See Jack Khoury, *Poll: 20% of the Arab Public will Vote for Predominantly Jewish Parties*, HAARETZ, <http://www.haaretz.com/hasen/spages/692250.html> (last updated Mar. 9, 2006) (according to the poll, Kadima will receive 9.9% of the Arab vote, compared to 7.5% for Labor). The same poll indicated that 66 percent of Israeli Arabs intended to exercise their right to vote.

⁷⁵ A complete list of Knesset members, at least 12 of whom are Arab members, may be found at http://www.knesset.gov.il/mk/eng/MKIndex_Current_eng.asp?view=1 (last visited Jan. 7, 2006).

⁷⁶ Included within this group of Knesset members are Azmi Bishara, Ahmed Tibi, Taleb al-Sana, Abdulmalik Dehamshe and Mohammed Barakeh. See Bishara's Blast, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?apage=2&cid=1134309618537&pagename=JPost%2FJPArticle%2F>

Israeli Supreme Court⁷⁷ and in the ministerial ranks of the government⁷⁸. Unlike Israeli Jews, who with several exceptions face compulsory army service, Arabs can choose to serve in the Israeli military; with rare exceptions, Palestinian Arabs do not so choose, but larger numbers of *Bedouin*⁷⁹ and Druze do.

No one should be deceived on the basis of the above sketch that Israel's record of inclusion of its Arab minority has been stellar; quite the contrary.⁸⁰ But, relevant to the present discussion, no less than Palestinian Arabs living in Israel, Israeli Jews, subject to certain conditions explored in Part IV of this article, should have a similar right to live within a Palestinian state.⁸¹ The continuance option in contrast to removal would allow Jews to

[ShowFull](#) (updated Dec. 21, 2005) (quoting Bishara as having said, among other things, "We Arabs aren't interested in your democracy. Give us Palestine and take your democracy with you."); Alexander Yakobson, *Assad's Advocates*, HAARETZ, <http://www.haaretz.com/hasen/spages/665417.html> (updated Jan. 3, 2005) (three of the Arab MK's alleged that the UN investigation into the death of the former Lebanese Prime Minister, Rafik Hariri, was influenced by Israel, wanting to maintain tension with Syria); Ze'ev Segal, *MK Bishara's Liberty*, HAARETZ, <http://www.haaretz.com/hasen/spages/679104.html> (last updated Feb. 6, 2006) (describing MK Bishara's expressions with respect to terrorism and a recent Supreme Court decision permitting his continued presence in the Knesset).

⁷⁷ In March 1999 Hamad Abdel Rahman Zuabi was appointed to a nine-month seat on Israel's Supreme Court, and in May 2004 Salim Joubran became the first Arab to obtain a permanent seat. See Greer Fay Cashman, *It Was Joubran's Day*, THE JERUSALEM POST, May 25, 2004, at 5.

⁷⁸ For example, Nawaf Masalha served as Deputy Minister of Foreign Affairs in the 28th government of Israel. See Israel Ministry of Foreign Affairs, [http://www.mfa.gov.il/MFA/Government/Previous+governments/Ministers%20and%20Senior%20Official s%20of%20the%2028th%20Governm](http://www.mfa.gov.il/MFA/Government/Previous+governments/Ministers%20and%20Senior%20Officials%20of%20the%2028th%20Governm) (last viewed Feb. 12, 2006).

⁷⁹ See David Ratner, *Bedouins to Staff Public Transportation Security Unity in South*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/660306.html> (updated Dec. 21, 2005).

⁸⁰ See e.g. Dan Rabinowitz, *A Lesson in Citizenship*, HAARETZ, <http://www.haaretz.com/hasen/spages/659905.html> (updated Dec. 21, 2005) (detailing how the Interior Ministry's decision to reject a request of a predominantly Arab town to expand favors the Jewish population in the same area); Ruth Sinai, *Arab Woman Petitions High Court Against Link Between Army Service, Mortgage Rights*, HAARETZ, <http://www.haaretz.com/hasen/spages/665372.html> (updated Jan. 3, 2006) (suit filed with Supreme Court, alleging that army service, or alternative national service, which are optional rather than mandatory for Arabs, discriminates against Arabs because mortgage law gives additional points for such service). On the other hand, there are ongoing efforts at greater inclusion. For one such example, see Gideon Alon, *Knesset Panel Recommends Building New Israeli Arab Town from Scratch*, HAARETZ, <http://www.haaretz.com/hasen/spages/683443.html> (updated Feb. 16, 2006) (the planning advisor of the Knesset Interior and Environment Committee has recommended the building of a new Arab town to deal with the shortage of space in existing Arab communities). For a legal discussion of these ongoing efforts, see Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM L. REV. 453, 479-98 (2003).

⁸¹ It should be noted that this question differs from whether there is a "right of return" for Palestinian refugees. See Ruth Lapidoth, *Do Palestinian Refugees Have a Right to Return to Israel?*, Dec. 1, 2001, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Do+Palestinian+Refugees+Have+a+Right+to+Return+to.htm?DisplayMode=print>. Recognition and implementation of a right of return would mean that Israel would cease to exist as a predominantly Jewish state. Recognizing a Jewish right to live in Palestine, particularly in the numbers that a final settlement with some border adjustments would imply, would not in any way undermine the future of Palestine as a predominantly Arab state.

live within their historic Jewish homeland, *Eretz Yisrael*, the land of Israel, although they would not be living within the state of Israel (*Medinat Yisrael*). Indeed, the single most important reason that supports the continuance over the removal option is that the former upholds the liberal principle that Jews, *qua* Jews, are not forbidden to live in a particular place, whereas the removal option undermines if not denies that right. Jordanian law forbade ownership of land by Jews.⁸² Similarly, under the Palestinian Authority, a sale of land by an Arab to a Jew is considered a capital offense, and sellers of land to Jews have been executed.⁸³ Are these truly policies that deserve reinforcement in a peace agreement between Israel and the Palestinian Authority that creates a Palestinian state?

To Jews, the principle that Jewish communities are not excluded from maintaining communities on the West Bank is particularly important for reasons of identity and history. Jewish identity began in the territory that the Roman Emperor Hadrian, following the Jewish revolt against the Romans in the second century, renamed *Syria Palaestina* in order to expunge its Jewish identity.⁸⁴ Their formation as a people occurred between the millennium or so B.C.E. and the first several centuries A.D., during which they inhabited the land, returned from a forced exile to it, built two temples there, and then transformed their religious practices from one based upon priestly sacrifices to one based upon prayer.⁸⁵ Excluding perhaps Jerusalem, specific areas of the West Bank which almost certainly would become part of a Palestinian state – for example, Hebron -- are more central to Jewish identity than areas west of the Jordan that would remain part of Israel⁸⁶ when borders are drawn. Jews had continually inhabited Hebron for millennia and continuously inhabited it for at least 500 years prior to a 1929 massacre at the hands of Muslim Arabs encouraged by Haj Amin al-Husseini, the British appointed grand mufti of Palestine, who later, living in Berlin as an adviser

⁸² DERSHOWITZ, ISRAEL, *supra* note 39, at 65 and 233; Benvenisti & Zamir, *supra* note 34, at 315; Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. COMP. L. 39, 47-48 (1980).

⁸³ See JUSTUS RIED WEINER, HUMAN RIGHTS OF CHRISTIANS IN PALESTINIAN SOCIETY 13 (2005), available at <http://www.jcpa.org/christian-persecution.htm>; Benvenisti & Zamir, *supra* note 34, at 315.

⁸⁴ Following the Jewish revolt led by Bar Kochba against Roman rule (132-135 c.e.), the Roman Emperor Hadrian took various measures against the Jews, including changing the name of the territory from Judaea (Israel) to Syria Palaestina. See H.H.BEN-SASSON, A HISTORY OF THE JEWISH PEOPLE 334 (Harvard 10th prtg. 1997).

⁸⁵ BEN-SASSON, *supra* note 84, at 3-342. See also GILBERT, *supra* note 44.

⁸⁶ PALESTINE ROYAL COMMISSION REPORT (London: His Majesty's Stationary Office, 1937) at 2 [hereinafter "Peel Report"] ("...by about 1100 B.C. the Israelites had occupied most of the hill-country in Palestine and ...were already distinguished from the peoples of the coast..."); Bradley Burston, *Want Greater Israel? Vote for the Left*, HAARETZ, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=681161&contrassID=2> (updated Feb. 10, 2006) ("Netanyahu...gave away nearly all of Hebron, a holy city second only to Jerusalem in its sanctity to Jews").

to Adolf Hitler, encouraged the latter to extend the Final Solution to the Jews living in the Middle East.⁸⁷ The general area in which Israel sits, most frequently labeled either the “Middle East” or “Near East”, is one where Jews were either entirely excluded – e.g., The Kingdom of Saudi Arabia, both historically⁸⁸ and even at present⁸⁹ – or subject to recurrent second-class status (*dhimmitude*)⁹⁰, persecutions and expulsions. In the words of one scholar, while “persecution of Jews in the Islamic world never reached the scale of Christian Europe...[,] that did not spare the ‘Jews of Islam’ ... from centuries of legally institutionalized inferiority, humiliating social restrictions and the sporadic rapacity of local officials and the Muslim population at large.”⁹¹ And, at least prior to the influx of Russian Jews in the later 1980’s and 1990’s, a majority of Israel’s Jewish citizenry were exiles from Arab lands, or the children or grandchildren of such exiles.⁹²

Equally important to Israel’s identity and statehood was its emergence in the aftermath of the Holocaust,⁹³ with the horrendous death of a majority of the relatives of most *Ashkenazi* Jews who settled in Israel. And an essential Nazi idea, precedent to the Holocaust itself, was the alleged “despoliation” of the Aryan race by the presence of Jews in Germany and Austria. Nonetheless, Israel established relations with the Federal Republic of Germany. But suppose that Germany had insisted as a price for such recognition that no Jew could henceforth live or own property within Germany. Is it conceivable that Israel would ever have signed such a peace treaty? For Israel to accept the fact that Jews, as Jews, cannot continue to

⁸⁷ DERSHOWITZ, ISRAEL, *supra* note 45, at 40-44.

⁸⁸ For descriptions of the slaughter of Jews and their expulsion from most of the Arabian peninsula, see 3 HEINRICH GRAETZ, THE HISTORY OF THE JEWS 76-85 (Jewish Publication Society, Philadelphia 1894); Hayim J. Cohen, *Arabia*, pp. 231-35 in 3 ENCYCLOPAEDIA JUDAICA (Keter Publishing, Jerusalem 1972).

⁸⁹ See Saudi Arabia, Country Reports on Human Rights Practices - 2004 released by the Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, February 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41731.htm> (last viewed Feb. 12, 2006).

⁹⁰ See MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS SHAYBANI’S SIYAR 11 (Johns Hopkins Press, Baltimore 1966): “the tolerated religious communities collectively called the ‘People of the Book’ or *Dhimmis* ... preferred to hold fast to their own law and religion at the price of paying a poll tax (*jizya*) to Islamic authority. The Muslims enjoyed full rights of citizenship while the followers of the tolerated religions enjoyed only partial civil rights...” It should be noted that the term *dhimmi* initially implied a protected status, but as time went on it connoted an unequal and inferior status which subjected Jews to harsh treatment.

⁹¹ EPHRAIM KARSH, *The Long Trail of Arab Anti-Semitism*, in RETHINKING THE MIDDLE EAST 97, 98 (2003).

⁹² See Sarah Sennott, *It Is Now or Never; Iraqi Jews who were Stripped of their Citizenship and their Homes over the Past Half Century may Finally get a Chance to Reclaim them*, NEWSWEEK.COM, <http://msnbc.msn.com/id/4703546/> (last updated Apr. 9, 2004).

⁹³ See generally TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST (1993); AMOS ELON, THE ISRAELIS, FATHERS AND SONS 198-204 (1971).

live in a predominantly Arab governed polity severs a nerve cord connected to an important historical underpinning of the state of Israel.⁹⁴

The removal and destruction of settlements from Gaza, in the context of the withdrawal of Israeli forces from Gaza, produced much soul-searching and agony, but did not present the same emotional, historical and geographic challenges that removal from the West Bank would present.⁹⁵ Nonetheless, the Gaza removal, like an earlier decision by Prime Minister Menachem Begin to abandon Yamit in the context of the 1979 Israeli-Egyptian peace treaty,⁹⁶ does offer precedent for the removal option. At the same time, another aspect of the Gaza withdrawal may actually offer a more apt analogy to the emotional agony of adopting and implementing the removal option in the context of West Bank settlements. In response to public outcry and its own soul-searching, the Israeli cabinet, reversing an earlier decision, decided not to destroy any of the synagogues in Gaza.⁹⁷

⁹⁴ For sure, there are those who like former Prime Minister Menachem Begin, who negotiated the Israeli-Egyptian peace treaty precisely to that position: as part of that peace treaty, Israel completely evacuated Yamit, an Israeli settlement, without any attempt to negotiate its continued existence as part of Egypt. Similarly, Prime Minister Ariel Sharon masterminded and successfully effected the evacuation of all Jewish settlements from Gaza. But, to Jews, the Sinai and even Gaza do not have the same standing as the West Bank from religious, historical or geographical perspectives. See *supra* note 86, and accompanying text, and *infra* note 95 and accompanying text.

⁹⁵ See Rafael D. Frankel, *Security and Defense: Has Unilateralism Run its Course?*, THE JERUSALEM POST, Feb. 16, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395428454&pagename=JPost%2FJPArticle%2FShowFull> (last viewed Feb. 17, 2006) (“[T]he West Bank was never viewed in the same light as Gaza by many Israelis. For years, a large segment of the country supported leaving the tiny coastal strip for demographic reasons, since only 8,000 Jews lived among 1.3 million Arabs. This sector also sought to stem what they considered to be the hemorrhaging of resources that providing security for the settlers there drained in terms of both money and blood. Moreover, Gaza was not the crucial security corridor that the West Bank is, nor were its sand dunes once home to the tribes of Israel, as were the hills and gullies of Judea and Samaria.”). The recent evacuation of an illegal settlement on the West Bank, Amona, gives some indication of the emotional and political complications of evacuating West Bank settlements in general. See Amos Harel, Arnon Regular, Nadav Shragai, & Johnathan Lis, *Security Forces Demolish Amona Homes Amid Violent Clashes*, HAARETZ, <http://www.haaretz.com/hasen/spages/676627.html> (last updated, Feb. 1, 2006) (over 200 wounded settlers and police officers, along with several members of the Knesset from parties supportive of the settlers). In the words of Hillel Halkin, “There is indeed something unacceptable about telling Jews that although they may live anywhere they wish, in New York and London, in Moscow and Buenos Aires, there is one part of the world they may not live in – namely, Judea and Samaria, those regions of the land of Israel most intimately connected with the Bible, with the second Temple period, and with Jewish historical memory, and most longed-for by the Jewish people over the ages.” Halkin, *supra* note 18, at 24.

⁹⁶ See Israel Ministry of Foreign Affairs, *Israel-Egypt Peace Treaty*, Dec. 28, 2005, available at [http://www.mfa.gov.il/MFA/Peace Process/Guide to the Peace Process/Israel-Egypt Peace Treaty](http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Israel-Egypt%20Peace%20Treaty).

⁹⁷ See Steven Erlanger, *Synagogue Dispute Clouds Gaza Transfer*, N.Y. TIMES, Sep. 10, 2005, at A7. (“But, the expected occurred, and the synagogues were razed by the Palestinians after the Israelis departed.”) Greg Myre, *Israel Lowers Its Flag in the Gaza Strip*, N.Y. TIMES, Sep. 12, 2005, at A10 (“Hours after the Israelis left the settlement of Neve Dekalim, young Palestinians were tearing aluminum window frames and metal ceiling fixtures out of the main synagogue there, as fires burned inside.”).

In sum, the continuance option maintains the principle that a minority, in this case, Jews, can maintain communities among a larger and different ethnic group, in the same way that Arab communities in Israel uphold the same principle. The removal option contradicts this principle, in much the same way that the principle would be violated if little-supported proposals to transfer Palestinian Arabs out of Israel to the state of Palestine were ever pursued. There are limits to the exercise of this principle – these are explored in Part IV – but the principle itself is a weighty one.

B. Jewish settlements as a metaphor of acceptance

The settlements should stay for another powerful reason. The Arab-Israeli dispute has been characterized by two competing narratives.⁹⁸ Each narrative incorporates both an “affirmative” case, relating the Jewish or Arab nexus to the land, as the case may be, and a “negative” brief, that has as its purpose and/or effect to deny the nexus asserted by the other. Unfortunately, the affirmative and negative parts of these stories are often so intertwined that separating these elements becomes difficult.⁹⁹

Many of the affirmative elements of the Jewish narrative have been presented above.¹⁰⁰ Its core is the several millennia nexus between the Jewish people and the land, *Eretz Y'srael*.¹⁰¹ Historically, Israel's

⁹⁸ See DERSHOWITZ, ISRAEL, *supra* note 39, at 24 (2003).

⁹⁹ “We were here *first*”, even without the accompanying negation of the conflicting narrative, can be understood as, “You were here *second*.”

¹⁰⁰ See *supra* notes 84-92, and accompanying text.

¹⁰¹ See, e.g., Dore Gold & Jeff Helmreich, *An Answer to the New Anti-Zionists: The Rights of the Jewish People to a Sovereign State in Their Historic Homeland*, JERUSALEM VIEWPOINTS No. 507 (Jerusalem Center for Public Affairs, Nov. 16, 2003), available at <http://www.jcpa.org/jl/vp507.htm>. Gold is a former representative of Israel to the United Nations. Other prominent parties who have described these narratives are Yehoshua Porath, Professor Emeritus from Hebrew University (See Yehoshua Porath, *Mrs. Peters's Palestine*, 32 THE N.Y. REV. OF BOOKS, 36-40, Nos. 21 & 22, Jan. 16, 1986, and Walter Reich, former director of the US Holocaust Museum, 1995-98, and Professor of International Affairs, Ethics and Human Behavior at George Washington University. See Walter Reich, *Reich's Letter to Samuel Rosner*, available at <http://www.haaretz.com/hasen/pages/rosnerGuest.jhtml?itemNo=670656> (last viewed Jan. 16, 2006).

Porath, writing a critical review of Joan Peters' *From Time Immemorial: The Origins of the Arab-Jewish Conflict over Palestine*, writes somewhat critically of some elements of the Jewish narrative, at least in its unquestioned form:

“Jews, and Zionists especially, developed their own myths about Palestine. First they interpreted ancient Jewish history according to the ideology of modern nationalism, equating the old Israelite and Judean kingdoms with modern nation-states. The Maccabean revolt and the period of Hasmonean rule were seen as typical manifestations of the struggle for modern national liberation. During the years when most Jews lived in exile, it was argued, they always kept a separate national identity: they never converted of their free will to another religion, and they preserved the memory of their ancestral land, to which they always hoped to return. Indeed, against all odds, some never left. Special emphasis was put on this last group. Every bit of evidence that could be found, however trivial it may have been, was used to prove the continuity of the Jewish presence

affirmative case was supplemented by its negative brief: Palestine was barely inhabited when modern Jewish immigration began; many Arabs came to Palestine attracted by the economic development produced by modern Zionism prior to the establishment of the State of Israel; Palestinians never considered themselves to be a separate people in a separate polity apart from other Arabs; and, in general, Arab states and the Palestinians have pursued repeated warfare and terrorism against Israel and the Jews.¹⁰² Combining its affirmative and negative elements, the Israeli narrative has historically portrayed the conflict as the unwillingness – carried to the extreme of Arab encouragement of the Holocaust, of successive wars against Israel, and of repeated acts of terrorism during the years of Israel’s existence – to permit the existence of a sovereign Jewish nation in the Middle East despite the demonstrated connection between the Jewish people and the land.

As might be expected, the Palestinian narrative substantially differs. Its affirmative case stresses the fact that at the end of the nineteenth century Palestine *was* inhabited, that Arabs formed the majority of the population, and that Arabs lived in villages – i.e., they were more than *Bedhouin* roaming across the deserts. More recently, Palestinians have sought to

in Eretz Israel and to show that it was central to the life of Jews in exile ... The Zionists argued that Jewish identity and the yearning to return to Palestine were strengthened by the persecutions of the Jews in all parts of the world, including the Islamic and Arab countries. The return itself was mainly perceived as a matter of Jewish resolve to establish a homeland, which required struggle against Palestine's foreign rulers—the Ottoman Empire first, and then the British Mandate.” Porath, *supra*, at 36.

Reich describes the Jewish narrative thus:

“It was a story that saw that the Jewish claim to the land as ancient and unbroken. Central to this story was the understanding that the Jews had lived in that land for over a thousand years; that it was the core of their cultural, moral and religious achievements; that while there they had developed the teachings that had spawned the three great religions of the West; that it was the place of their Temples and the site of their worship and their Zion; that ultimately most of the Jews were exiled from that land; that many nevertheless remained in it; that the exiles continued to pray, three times a day, for a return to it; that while they were in exile in Europe they were constantly abused and repeatedly and genocidally massacred; that as a result, in the nineteenth century, Herzl and other political Zionists created a movement, Zionism, to bring Jews back to their homeland, their Zion, where they could a normal nation, determine their own destiny and protect themselves; and that the creation of Israel was a just achievement based on the origin of the Jews in that land and a necessary achievement based on the centuries of massacres and genocide the Jews had endured in exile, of which the Holocaust was the most recent and most stunning example.”

¹⁰² Porath describes the negative brief as follows: “The Arab population was not presented as a major obstacle since, it was said, it was so small. Palestine during the late Ottoman and early British periods was portrayed as a barren land, hardly inhabited, whose tiny Arab population consisted mostly of wandering Bedouin tribes whose presence was only temporary. According to the Zionist myth, only modern Jewish colonization brought about the economic development of Palestine and improved the hard conditions there. These developments, it was said, attracted poor Arabs from the stagnant neighboring countries. Their numbers grew faster than the Jewish immigrants because the malicious British authorities always encouraged them to come and did much to help to absorb them, both economically and legally.” Porath, *supra* note 101, at 36.

buttress their claim to the land with the assertion that Palestinian are descended from the Canaanites and therefore have always inhabited the land, preceding even the ancient Hebrews. It is the Palestinian negative brief, however, that has seemed to merit the most repetition. Walter Reich, former director of the United States Holocaust Museum and now Professor of International Affairs, Ethics and Human Behavior at George Washington University, describes its elements as follows:

According to the Palestinian narrative, Jews have no right to the land, and even had nothing, or little, to do with it in the past. The Jews of today are seen as unrelated to the Hebrews who lived there two thousand years ago; according to some versions of this narrative, European Jews were simply the offspring of converts in Europe, and were not descended from the Hebrews who used to live in what is now Israel and the West Bank. So important is it for the Palestinian "narrative" to deny the Jewish connection with the land - and therefore the justice of the Zionist return - that even the existence of the Temples is denied. ...

By creating Israel, Europeans were colonizing Palestine, coming there without any basis for their arrival, much as the French had colonized Algeria and the Boers and British had colonized South Africa.¹⁰³

According to this view, then, Israel's creation – a European colonial enterprise to deny Palestinians, the indigenous population, their right to the land and sovereignty¹⁰⁴-- was "utterly unjust."¹⁰⁵

¹⁰³ Reich, *supra* note 101.

¹⁰⁴ This view suffuses and affects the legal analyses some authors. *See, e.g.,* the writings of Thomas Mallison, *supra* notes 20 & 21, and, more recently, Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L. J. 65, 72-8 & 101 (2003). It is also repeatedly emphasized in the various writings of Edward Said. *See, e.g.,* SAID, *supra* note 4. Summarizing Said's writing on the subject, Karsh characterizing Said's view as "the local populations of the Middle East, the Arabs in particular, as the hapless victims of an alien encroachment ..." *See* EFRAIM KARSH, *RETHINKING THE MIDDLE EAST*, *supra* note 37, preface. Porath describes the Palestinian "myths" in the following terms: "The Arab side tried to prove that first of all the Jews were not a nation in the modern sense of the term and consequently did not require a state of their own. In the tradition of both Western liberal and doctrinaire socialist thinking, the Arabs argued that the Jews were only a religious community; that peoples could not return to their ancient homelands without turning the entire world upside down; and, most important, that Palestine had been settled since the seventh century AD by Arabs. Over the years many Arab ideologists even claimed that Arabs had occupied the land in pre-Biblical times because of the "Arab character" of Canaanites. ¶Zionism, the Arab argument continued, if it had any grain of historical justification at all, emerged only in a European setting. It came about as a reaction to Western Christian or secular and racist anti-Semitism, with which the Arabs had nothing to do; therefore, they should not be required to pay the costs of remedying it. In Arab and Islamic countries Jews suffered none of the terrible

To what degree have Jews and Arabs remained steadfast in believing in and/or adhering to these narratives? Most Israelis still believe in the positive core of their narrative – that Zionism and the resultant State of Israel represented the act of self-determination by a people with an extraordinarily strong physical, emotional and religious nexus to the land¹⁰⁶ – but have abandoned key elements of their negative brief.¹⁰⁷ In doing so, most Israelis understand that the Jewish/Arab struggle is, in the words of Chaim Weizmann, the first president of Israel, “not the clash of right and wrong, but the clash of two rights.”¹⁰⁸ It is unclear, however, whether Arabs, in general, and Palestinians, in particular, have similarly abandoned those narrative elements that would deny any legitimacy to Jewish historical claims.¹⁰⁹ Writing approximately 15 years ago, Michael Curtis noted, “it needs to be reiterated that the core of the Arab-Israeli conflict remains what it has been for some seventy years, the implacable opposition by Arab states, except Egypt since 1979, to the Jewish presence in the Mandate area of Palestine and, since 1948, to the existence of the state of Israel.”¹¹⁰ While in the subsequent fifteen years Jordan has made peace with Israel and the Palestine National Council met to revise the Palestinian Liberation

treatment that Western Jews had suffered. On the contrary, the Muslims in general and the Arabs in particular treated their religious and ethnic minorities with full equality and enabled both Christians and Jews to take part in public life, to rise to high positions of state, and, in recent times, to become full members of the modern and secular Arab nation living in its various states. The Jews living in the Arab and Muslim countries, moreover, did not take part in the Zionist movement. They even actively opposed it and did not want to emigrate to Israel. That most of them eventually did so the Arabs attribute to the machinations of Israel working with corrupt Arab rulers who were “stooges of imperialism.”¶After the 1948 war Arab propaganda added an important new claim: since the Jews wanted Palestine empty of Arabs, they used the opportunity of the war to systematically expel the indigenous Arab population wherever they could do so. Some Arab writers, and others favorable to their cause, have gone so far as to claim that the war itself was set off in December 1947 by the Jews in order to create the right circumstances for the mass expulsion of Palestinian Arabs from their homeland. ¶Until the mid-1960s the Arab claims were usually presented as part of the ideology of Arab nationalism. Palestine was (and ideologically speaking still is) considered part of the greater Arab homeland and the Palestinians part of the greater Arab nation. The aim of the Arab struggle was to preserve the Arab character of Palestine from the Jewish-Zionist threat. The Palestinian case was at best secondary when it was made at all. Only since the middle of the 1960s and particularly after 1967 has the distinctively Palestinian component become relatively stronger among the factors that shape the identity of the Palestinian Arabs.” Porath, *supra* note 101 at 36.

¹⁰⁵ Reich, *supra* note 101.

¹⁰⁶ See Raday, *supra* note 30 at 461-68.

¹⁰⁷ This is not to say that all elements of the Israeli negative brief are incorrect, any more than that there is no truth to the Palestinian negative brief. For example, Kenneth Stein’s exhaustive study of histories of the Middle East revealed that “[b]efore 1950, Arab histories that treated Palestine or the Palestinian Arabs as separate historical entities were extremely rare.” Kenneth W. Stein, *A Historiographic Review of Literature on the Origins of the Arab-Israeli Conflict*, 96 THE AMERICAN HISTORICAL REVIEW, 1450, 1454 (1991). He added, “Most Arab historians viewed Palestine as a geographic adjunct to greater Syria and Palestinians as a small but integral portion of a larger Arab nation.” *Id.* at 1455.

¹⁰⁸ Eugene V. Rostow, *Correspondence*, 84 AM. J. INT’L L. 717, 719 (1990).

¹⁰⁹ DERSHOWITZ, ISRAEL, *supra* note 39, at 24.

¹¹⁰ Michael Curtis, *International Law and the Territories*, 32 HARV. INT’L L.J. 457, 460 (1991).

Organization charter¹¹¹ – sometimes referred to as the Palestine National Charter – the only publicly available version still calls for the destruction of Israel¹¹² as does the even harsher representation of Israel and Jews in Hamas’ charter.¹¹³ And, as recently as the Camp David summit between then Israeli Prime Minister Ehud Barak, President Yasir Arafat of the Palestinian Authority, and President Clinton, Arafat reportedly insisted on “repeat[ing] old mythologies and invent[ing] new ones, like, for example, that the Temple was not in Jerusalem ...”¹¹⁴

To the Israelis, the question is an existential one: can Jews, as Jews, live with a degree of power and not in *dhimmi* status within the Middle East? That is, is there some acceptance of the Jewish narrative of a permanent and continual connection between the Jewish people and this land? Whether Jews are permitted to live within a Palestinian state, in effect, then, is a metaphor as to whether Israel, as a Jewish nation, can live in a sea of 22 or, once Palestine is established, 23 different Arab nations within the area.¹¹⁵ And if the answer is negative – that is, any Arab state that is established must exist without Jewish settlements – then that answer portends that any Palestinian state that will be established will not have as its true goal the two-state solution. To Israel, the question of establishing a legal entity of Palestine depends upon whether that is the end of the conflict – an acknowledgement that Jews too have rights to the land (as Israel, in recognizing such a Palestinian state, would reciprocally be acknowledging) – or simply a strategic move to be supplanted in the future by one predominantly Arab state.¹¹⁶

¹¹¹ Permanent Observer Mission of Palestine to the United Nations, *Decisions and Actions Related to the Palestine National Charter* (1996), http://www.palestine-un.org/plo/pna_one.html (last viewed Feb. 12, 2006).

¹¹² See Palestine National Charter, http://www.palestine-un.org/plo/pna_three.html (last viewed Feb. 12, 2006).

¹¹³ See *supra* note 42. See also Richard Cohen, *A Disturbing Invitation*, WASH. POST, Feb. 14, 2006, at A15 (discussing the extent to which Hamas is not only anti-Israel but virulently anti-Semitic).

¹¹⁴ Dennis Ross, *Camp David: An Exchange*, 48 THE N.Y. REV. OF BOOKS, No. 14, Sep. 20, 2001, at 90.

¹¹⁵ See Halkin, *supra* note 18, at 27 (“One thing should be clear. A West Bank without Jews means a Palestine and Israel without a normal relationship.”); Halkin, *Beyond the Geneva Accords*, *supra* note 22 at 26 (“The issue, should be clear, is not one of sovereignty. There is no reason why, under conditions of peace, Jewish towns and villages should not exist in a sovereign Palestine as Arab towns and villages exist in a sovereign Israel. On the contrary: if a sovereign Palestine cannot tolerate the presence of Jews, in what sense has it made peace with a Jewish state?”).

¹¹⁶ See Giora Eiland, *The Palestinian Authority and the Challenge of Palestinian Elections*, 5 JERUSALEM ISSUE BRIEF, Feb. 1, 2006, available at <http://www.jcpa.org/brief/brief005-16.htm> (last viewed Feb. 2, 2006) (“The second strategic decision that the Palestinians have yet to make is to recognize that a two-state solution means that on one side there will be a Palestinian state, but on the other side there will be a Jewish state.” *Id.* at 5). Eiland, who is head of Israel’s National Security Council, adds, “I have never heard any real Arab leader say loud and clear that Israel has the right to exist as a Jewish state. We are looking for real recognition of the right of a Jewish state to exist alongside a Palestinian state and we have not yet

C. Contiguity and Borders

If the Palestinian Authority succeeds in establishing order and a functioning self-governing entity in Gaza¹¹⁷ and if Hamas' recent victory in

heard it." *Id.* See also Daniel Pipes, *Why Hamas Leaves Me Neutral*, N.Y. SUN, Jan. 31, 2006, <http://www.nysun.com/article/26722> (last viewed Feb. 2, 2006) ("...the elections might bring benefits, prompting Israelis finally to recognize the deep and pervasive anti-Zionism in the Palestinian Arab body politic."); Henry A. Kissinger, *What's Needed From Hamas*, WASH. POST, Feb. 27, 2006, at A15 ("Even relatively conciliatory Arab statements, such as the Beirut summit declaration of 2003, reject Israel's legitimacy as inherent in its sovereignty; they require the fulfillment of certain prior conditions. Almost all official and semi-official Arab and Palestinian media and schoolbooks present Israel as an illegitimate, imperialist interloper in the region. Even Robert Malley and Hussein Agha, who are in the minority in not ascribing all responsibility for the breakdown of the Camp David talks in the summer of 2000 to Arafat and the Palestinians (see *infra* note 195), describe the Palestinian perspective in the following terms: "For all the talk about peace and reconciliation, most Palestinians were more resigned to the two-state solution than they were willing to embrace; they were prepared to accept Israel's existence, but not its moral legitimacy. The war for the whole of Palestine was over because it had been lost. Oslo, as they saw it, was not about negotiating peace terms but terms of surrender." Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, N.Y. REV. OF BOOKS, Aug. 9, 2001, 59-64 at 62.

Hamas has been even more explicit about its aim of liberating all of Palestine even if, after the Parliamentary elections, it extends the *hudna*, or truce, against Israel. Hamas Leader Khaled Mash'al, in remarks at a Damascus mosque on February 3, 2006, "By Allah, I know that all Arab leaders – and I have met many of them – deep inside want the resistance in Palestine to be victorious, and want Palestine to be liberated. Perhaps the need for flattery and for diplomacy, and the American hegemony, force other things on them, but in their hearts they are happy when we are victorious." The Middle East Media Research Institute (MEMRI), Special Dispatch Series – No. 1087, <http://memri.org/bin/latestnews.cgi?ID=SD108706> (Feb. 7, 2006). See also Asaf Maliach, *Hamas' post-election Strategy, Step-by-step to the liberation of Palestine*, Feb. 5, 2006, <http://www.ict.org.il/articles/articleDet.cfm?articleid=557> (last viewed Feb. 17, 2006) ("Hamas' calls for the 'Hudna' with Israel is merely an ancient maneuver commonly used by radical Islamic organizations to reestablish and strengthen their power without being exposed to danger from their adversaries. The 'Hudna' is intended to serve the *step by step program* that Hamas advocates for the liberation of all of Palestine, from the sea to the river." *Id.* at 4). Even more recently after it has won a majority of seats in the Parliamentary elections and been asked to form the next Palestinian Authority government, Hamas has submitted for approval a "cabinet with hardliners." Stephen Farrell, *Defiant Hamas packs Cabinet with hardliners*, TIMES ONLINE, <http://www.timesonline.co.uk/printFriendly/0,,1-3-2095266-3,00.html> (Mar. 21, 2006)

¹¹⁷ As of this date, lawlessness in Gaza is undermining attempts to organize a civil society that is a prerequisite for statehood. See, e.g., Stephen Farrell and Ian MacKinnon, *Red Cross leaves 'Lawless' Gaza*, LONDON TIMES ONLINE, Aug. 10, 2005, <http://www.timesonline.co.uk/article/0,,251-1729052,00.html>; Sarah El Deeb, *Palestinian Police Storm Gaza-Egypt Border*, WASH. POST, Dec. 30, 2005, <http://www.washingtonpost.com/wp-yn/content/article/2005/12/30/AR2005123000176.html> (describing how, after gunmen involved in a family feud killed a police officer, police who were the deceased's family and friends stormed the border crossing to prevent members of the families involved in the feud from exiting, to the consternation of European monitors who fled the scene); Conal Urquhart, *Frantic search for aid worker and parents as gan fails to make contact*, THE GUARDIAN, Dec. 30, 2005, <http://www.guardian.co.uk/israel/Story/0,2763,1675137,00.html> (describing the growing anarchy in Gaza resulting from "the inability of the PA to impose its authority over the armed men who fought against Israeli forces since the beginning of the second intifada in 2000); Ian MacKinnon, *Increase in seizures prompted exodus of foreigners*, <http://www.timesonline.co.uk/article/0,,251-1963176,00.html> (Dec. 30, 2005) ("Security has deteriorated to such an extent over the past year that only a few dozen international staff dare to live and work in Gaza [, as a result of]...the authority ... cav[ing] in to the kidnappers' demands, fuelling the cycle of seizures by clans or groups of renegade gunmen who have seen the

Palestinian parliamentary elections does not derail peace efforts, it is inevitable that a Palestinian state, the geographic bulk and center of which will consist of much of the West Bank, will be established. In addition to the question of how Gaza and the West Bank will be connected, a key focus now has become whether the West Bank part of that state will be a contiguous unit, with sensible borders, or a group of loosely tied districts. Given the very small area west of the Jordan, only 10,871 square miles,¹¹⁸ drawing borders with the clarity that often characterized colonial borders is impossible, and contiguity for both a predominantly Jewish and a predominantly Arab Palestinian state is not easy to achieve. The Peel Commission Partition Plan of July 1937 would have allowed for a contiguous Arab state, but not a contiguous Jewish state¹¹⁹; a 1938 Jewish proposal for partition foresaw both a Jewish and an Arab state in several sections¹²⁰; a British proposal for partition of the same year envisioned a Jewish state in two sections and an Arab state that included Jaffa but was physically cut off from it¹²¹; and pursuant to the 1947 United Nations Partition Plan, accepted by the Jews but rejected by the Arabs, both Israel and the Palestinian state would have had three different segments. And, perhaps most significant to the present discussion, even a cursory look at a map of Israel slightly north of Tel Aviv, its largest city, reveals a pre-1967 “waist-line” of only approximately 15 kilometers, in an area with a population even more dense than that of the Gaza Strip.¹²² It has been suggested that if the largest of the settlements, *Maale Adumim*, remained under Israeli sovereignty and were connected to Jerusalem by construction in the several kilometer stretch between the two, a Palestinian state would lack contiguity, but, in fact, the Palestinian state would still have the same width at that point, 15 kilometers as has Israel at its narrowest point. In other words, continuance of Israeli settlements on the West Bank even if

snatching of foreign staff as a quick way to resolve their difficulties.”); Ze’ev Schiff, *Escalation is inevitable*, HAARETZ, <http://www.haaretz.com/hasen/spages/664152.html> (updated Dec. 30, 2005) (describing how all the assumptions about the cessation of Qassam rockets being fired against Israel once Israel withdrew from Gaza have proved wrong); Editorial, *Democracy in Palestine*, <http://www.telegraph.co.uk/opinion/main.jhtml;jsessionid=ELQTRLBWAKJ4BQFIQMGCF4AVCBQUIV0?xml=/opinion/2005/12/30/dl3002.xml&sSheet=/news/2005/12/30/ixnewstop.html> (Dec. 30, 2005) (“Mahmoud Abbas’s chronic inability to contain Palestinian violence has been demonstrated this week in both part of the Occupied Territories.”).

¹¹⁸ JULIUS STONE, ISRAEL AND PALESTINE 17(1981).

¹¹⁹ See Peel Report, *supra* note 84, at 382-86 and map No.8, “Partition Provisional Frontier”. The map is reproduced in GILBERT, *supra* note 44. The Peel Commission was appointed by Edward, the 8th, to determine the causes of riots in Palestine in 1936 and to make recommendations to prevent their recurrence.

¹²⁰ See GILBERT, *supra* note 44, at 26.

¹²¹ See GILBERT, *supra* note 44, at 27.

¹²² See U. Elitzur, *It’s Crowded Around Here*, Oct. 6, 2005, www.yenetnews.com; *The Contiguity Double Standard*, 14 CAMERA MEDIA REPORT #2 at 15-6 (Fall, 2005); Routledge Atlas at 53.

they remained under Israeli sovereignty would probably not result in a Palestinian state any less convoluted than the State of Israel.

Nonetheless, contiguity has seemingly been elevated from wise policy, to the extent it can reasonably be achieved, to principle, and a frequent allegation leveled against Jewish settlements is that they prevent a contiguous Palestinian state with sensible borders.¹²³ And the facile conclusion is that if the presence of settlements with Israeli Jews prevents a contiguous state with sensible borders, then the simple solution is to remove rather than tolerate them.¹²⁴ Both principle and policy, however, militate in favor of continuance over removal.

The principled reason has already been explored: removal only achieves contiguity at the expense of the principle that Jewish communities, just *because* they are Jewish communities, should not automatically be excluded from the Land of Israel, whereas the continuance option, by separating the concept of Jewish settlements from Jewish sovereignty, allows for both contiguity and that principle.

The policy reason takes account of political reality. With its implicit equation of Jewish settlements and Israeli sovereignty, the removal option puts tremendous stress on the question of the exact location of the border between Israel and a state of Palestine. This phenomenon is reflected, for example, in pressure to expand Jerusalem eastward so that Jews inhabit a geographic continuum between Jerusalem and settlements east of it.¹²⁵ In

¹²³ See Editorial, *Bush, Abbas Intentions*, BOSTON GLOBE, Oct. 21, 2005, at A16, (“Palestinians perceive continued thickening of settlements as proof that Israel has no intention of allowing a viable Palestinian state on land that is not divided into multiple separate enclaves.”); Yehezkel Lein, *Land Grab Israel’s Settlement Policy in the West Bank* at 42 (B’Tselem May 2002) (“many settlements block the territorial continuity of dozens of Palestinian enclaves... This lack of contiguity prevents the establishment of a viable Palestinian state, and therefore prevents realization of the right to self-determination.”). For example, it has been charged that Israeli construction of housing on the several kilometers of land that lie between Jerusalem and Maale Adumim, the largest of the West Bank settlements, would preclude contiguity for a state of Palestine. In fact, however, such a state to the east and southeast of Maale Adumim would still have a waist as wide as that of Israel in the Qualkilya-Kfar Saba area. See HonestReporting Communique, *Orla Guerin’s Lack of Contiguity*, May 2, 2005, http://www.honestreporting.com/articles/45884734/critiques/Orla_Guerins_Lack_of_Contiguity.asp. For specific examples of smaller settlements that are said to interfere with Palestinian community contiguity south of Jerusalem, see Lein, at 102.

¹²⁴ That is the Palestinian view, voiced over and over in various meetings and pronouncements. See, for example, the views expressed to President Bush by Palestinians aids of Abbas in a recent meeting. Kessler, *supra* note 9.

¹²⁵ See Nadav Shragai, *Expand J’lem beyond the Green Line, Panel Urges*, HAARETZ, <http://www.haaretz.com/hasen/spages/662691.html> (updated Dec. 27, 2005) (describing proposals by Zionist Council in Israel for widened corridors and housing that would connect Jerusalem to settlements to the North, East and South of it rather than continuing to build Jerusalem westward); Caroline Glick, *Column One: Where Olmert Leads, Israel Mustn’t Follow*, THE JERUSALEM POST, Feb. 10, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395379720&pagename=JPost%2FJPArticle%2FShowFull> (criticizing the Olmert government for not proceeding to build the Jewish neighborhood that would connect

contrast, if Jews could be assured that, as Jews, they would be allowed to live safely and freely within *Eretz Yisrael*, albeit outside of Israel's sovereignty, less opposition can be expected to the question of exactly where the border will lie.¹²⁶ And the weight the question holds – does the final resolution involve the forced removal of between 50,000 to 100,000 people, including Jews who perceive of their communities in religious terms, or does it only involve acknowledging Palestinian sovereignty without interfering with the lives of the people in these communities? – bears on not only the probable success of negotiations, but the time it will take to arrive at a resolution. In short, it is actually the continuance option that offers the greater prospect of a Palestinian state, Gaza aside, that minimally has borders that make as much sense as the Green Line that characterized Israel's pre-1967 *de facto* borders.

D. Cost considerations

Continuance of Jewish settlements is also the least expensive way of creating a Palestinian state. Although the Road Map called for the creation of a Palestinian state by 2005, there is still great impetus for that reality to be created sooner rather than later. Three sets of cost considerations need to be considered: the costs associated with establishing a viable Palestinian state; the costs associated with resolving the Palestinian and Jewish refugee problems; and, if removal rather than continuance is the option effected, the cost to Israel of removing and resettling all settlers not within Israel's final borders once a peace agreement is concluded.

The first broad category of costs includes those associated with insuring the viability of the new Palestinian state. To bolster the Palestinian economy and to provide other practical perquisites for statehood will require billions of dollars.¹²⁷ Even in anticipation of Israel's withdrawal of

Ma'ale Adumim with Jerusalem and, in changing the security fence to exclude the Palestinian village of Japba, for endangering the movement between Gush Etzion and central Israel); Nadav Shragai, *No more Talk of Unified Jerusalem*, HAARETZ, <http://www.haaretz.com/hasen/pages/ShArtVty.jhtml?sw=Nadav+Shragai&itemNo=690895> (last updated Mar. 7, 2006) (describing the sharp disagreements over what neighborhoods in or closely adjacent to Jerusalem will remain in any "division" of the city).

¹²⁶ See references in notes 454 and 455, *infra*, as to the diminishing role of sovereignty in its classical sense. Analogously, Israel's peace treaty with Jordan recognized Jordan's sovereignty over certain areas which were then effectively leased back to Israel for an initial period of 25 years. See Annex I to *Treaty of Peace Between Hashemite Kingdom of Jordan and State of Israel*, Oct. 24, 1994, available at <http://www.kinghussein.gov.jo/peacetreaty.html>.

¹²⁷ By way of example, to build an internal security infrastructure the Palestinian Authority could require up to \$7.7 billion over its first decade, according to a study. See *Rand: Palestinian State will Need Crack, \$7.7 Billion Security System*, WORLD TRIBUNE, May 9, 2005,

settlements from Gaza, the World Bank estimated that an additional \$1.8 billion of donor aid would be necessary.¹²⁸ The costs for insuring the economic viability of a Palestinian state following an Israeli withdrawal from the West Bank would be exponentially higher. While much of its economic success would be dependent upon the ability of a much higher number of Palestinians to find labor in Israel again, as in the period prior to the 2000 intifada, increasing Palestinian economic independence is highly desirable.¹²⁹ The most recent World Bank Report on the Palestinian economy credited its real 8-9 percent growth of gross domestic product in 2005, on the financial side, to large increases in both credit to the private sector – 30 percent – and donor disbursements – 20 percent to \$1.1 billion.¹³⁰ Its conclusion is that “[t]he only satisfactory way forward is to combine good policies by both sides with more money”,¹³¹ and called on “[d]onors ... to increase their assistance levels” further.¹³²

The creation of a *de jure* Palestinian state, with recognition by Israel, the United States and others, will almost certainly require a permanent resolution of both the Palestinian and Jewish refugee problems. Otherwise, felt grievances that have made peace between Israel and Palestinians in the Middle East so illusive will continue to hamper true reconciliation. Those Palestinian refugees, or their descendants, who fled Israel or the territory that became Israel in the 1947-48 period, will have to abandon their claimed right of return to places within the borders of Israel. It matters little whether international law supports such a right of return¹³³ or the exact circumstances of their exodus. Some refugees – probably small in number compared with those claiming refugee status -- might in fact be allowed to reunite with family in Israel itself, but, for most, resolution of their status will entail permanent residence and citizenship in other parts of the Arab world and/or within the new Palestinian state, with some compensation for claimed losses of property within the state of Israel. Resettlement and payments for

http://www.worldtribune.com/worldtribune/WTARC/2005/me_palestinians_05_09.html (last visited December 28, 2005).

¹²⁸The World Bank, *Disengagement, the Palestinian Economy and the Settlements* at 5 (June 23, 2004).

¹²⁹ World Bank, *The Palestinian Economy and the Prospects for its Recovery, Economic Monitoring Report to the Ad Hoc Liaison Committee* (Number 1, Dec. 2005) at 22.

¹³⁰ *Id.* at 1 and 4.

¹³¹ *Id.* at 2.

¹³² *Id.* at 5.

¹³³ For doubts as to whether such a right of return exists in international law, see STONE, *supra* note 118, at 67-9; Ruth Lapidot, *Legal Aspects of the Palestinian Refugee Question*, 485 JERUSALEM LETTER/VIEWPOINTS, Sep. 1, 2002, at 3-4 (Jerusalem Center for Public Affairs), available at <http://www.jcpa.org/jl/vp485.htm>.

claimed property losses will itself cost tens of billions of dollars.¹³⁴ Jews forced to flee from Arab countries, contemporaneously with or soon after the establishment of the state of Israel, are similarly seeking compensation for the loss of value of their homes and businesses.¹³⁵ In the words of Julius Stone, “any rule of international law requiring rights of return or compensation would have to apply equally to Jewish refugees from Arab countries...”¹³⁶

If the removal rather than continuance option were chosen, it is necessary to consider as well the cost of evacuating and resettling any Jewish settlers whose settlements are not included within the borders of Israel as negotiated between it and the Palestinian Authority. The aggregate cost of removing 7,000 settlers from Gaza and initiating their resettlement has already exceeded \$1 billion.¹³⁷ As of four years ago, one party estimated that the total cost of evacuating all the settlements at over \$20 billion,¹³⁸ an amount that would have to be adjusted upwards to take account of inflation in the price of housing within the pre-1967 borders of Israel. Moreover, the definition of “cost” becomes relevant. Most usage of the term in the Gaza context referred to the cost of compensating Gaza residents for the loss of their homes. Necessarily, any compensation suffers from being both highly subjective and highly objective, at one and the same time. The scheme is

¹³⁴ While no exact figures have been discovered, over 8 million Palestinians claim refugee status, while United Nations figures show over 4 million as of June, 2004. See Palestinian Refugee Research Net, *Palestinian Refugees: An Overview*, http://www.arts.mcgill.ca/mepp/new_prn/background/index.htm (last viewed Feb. 12, 2006). If the larger figure were really used, \$1,000/refugee would itself exceed \$8 billion; if that amount were raised to \$10,000 per refugee, the amount would rise to \$80 billion.

¹³⁵ See American Sephardi Federation, *Jewish Refugees from Arab Countries*, http://www.americansephardifederation.org/sub/sources/jewish_refugees.asp (last viewed Feb. 12, 2006). For a detailed study of the property that was seized, see generally ITAMAR LEVIN, *LOCKED DORRS: THE SEIZURE OF JEWISH PROPERTY IN ARAB COUNTRIES* (2001).

¹³⁶ STONE, *supra* note 118, at 67.

¹³⁷ Different sources report different calculations. Compare Meirav Arlosoroff, *Billion-Shekel Culture Shock*, HAARETZ, Dec. 6, 2005, <http://www.haaretz.com/hasen/pages/ArticleContent.jhtml?itemNo=654026> (“The civilian cost of evacuating Gaza, the cost of moving just 1,700 families, has already reached NIS 5 billion to NIS 6.5 billion.”, with 4.62 Israeli shekels to the US dollar on Dec. 6) with Motti Bassok, *Fischer: Israel’s Credit Rating Could be Raised with Stable Fiscal Responsibility*, HAARETZ, Dec. 21, 2005, <http://www.haaretz.com/hasen/spages/660416.html> (“The total civil cost to the state of disengaging from the Gaza Strip has reached NIS 4.8 billion, according to Yonatan Bassi, head of the Disengagement Administration”, with 4.598 Israeli shekels to the dollar on Dec. 21, 2005). Neither figure appears to include the full costs, including the loss of income to the evacuees, most of whom are not employed yet, the psychological and similar personal related costs, or the military costs of removal. All of these were considerable. The military costs would have to include the costs of mobilizing and devoting a sufficient number of appropriate military personnel to handle the removal. A more recent estimate of the cost of evacuating the Gaza settlements is NIS 11 billion, or approximately \$2-2.5 billion. See Zvi Barel, *Pullout pipe dream*, HAARETZ, <http://www.haaretz.com/hasen/spages/698427.html> (last updated Mar. 26, 2006).

¹³⁸ Halkin, *Why the Settlements Should Stay*, *supra* note 18, at 22.

highly subjective in the sense that politics and availability of funds determine the outcome as much as any rigorous effort to determine all the financial costs of resettlement.¹³⁹ As of three months after the disengagement from Gaza, three-quarters of the evacuees were unemployed and a substantial number still living in tents.¹⁴⁰ The scheme is highly objective in the sense that rather than an individualized and highly particularized calculation, settlers are treated in broad categories. While the exact number of settlers that would have to be compensated from a West Bank withdrawal varies depending upon which settlements would remain in an Israel with modified borders, the number is usually presented as upwards of 70,000 people. Moreover, since greater opposition to the removal of West Bank settlements can be expected, even the cost of implementing such a decision would probably well exceed the enforcement expenses in evacuating the Gaza settlements.¹⁴¹ Inevitably, Israel would turn to the international community and especially the United States to aid with such a resettlement at the same time that enormous financial demands would be made upon that same external community to fund the costs of a new Palestinian state as well as to resolve the Palestinian and Jewish refugee problems.

In sum, requiring as a condition for the creation of a Palestinian state that no Jewish communities continue to exist within its borders would mean substantially aggravating the calculus of the total costs of that creation. Correlatively, the fastest and least expensive means of achieving a Palestinian state is to allow Jews to remain within its borders.

IV. Conditions precedent for Israeli Jewish settlements in a state of Palestine

All other things being equal, continuance is preferable to removal based upon considerations of principle, contiguity, cost and final resolution of the conflict. But are other things equal? It has been argued that Jewish settlements stand on “Arab” land, violate international and other law, and prevent the establishment of a viable, sovereign Palestinian state, and that neither Jews nor Arabs would find it practical to have Jewish settlements continue to exist in that state. These arguments, in effect, posit conditions

¹³⁹ Arsoloff, *supra* note 137.

¹⁴⁰ Nadav Shragai, *75% of Pullout Evacuees Jobless*, HAARETZ, Nov. 9, 2005, <http://www.haaretz.com/hasen/spages/643163.html>.

¹⁴¹ See e.g., the enormous costs of evacuating a few settlers from the illegal settlement of Amona, given the number of other people who join in protesting the decision. Jonathan Lis, *Amona Evacuation Cost NIS 7.5M, Most of it from Money Earmarked for War on Crime*, HAARETZ, Feb. 9, 2006, <http://www.haaretz.com/hasen/spages/680575.html>.

that must be satisfied for Jewish settlements to remain in Palestine: that settlements are not shown to have been established on “Arab” land; that their establishment is not demonstrated to have been “illegal” under international and other law; that their presence does not prevent the creation of a viable sovereign Palestinian state; and that continuance rather than removal is a pragmatic solution.

These have been identified as necessary conditions not only because they respond to arguments and concerns that have been voiced against, or about, Jewish settlements on the West Bank, but also for independent good cause. The condition that Jewish settlements not lie on land that legally belongs to another is based upon the principle that even military victory does not justify theft of property.¹⁴² Abstractly, at least, the international law condition – that the creation or continued presence of the settlements not be conclusively demonstrated to have violated that body of law -- is premised both upon respect for that body of law, and the instrumental consideration that if actions contrary to law are validated, one simply invites additional breaches. Exploring the legality of Jewish settlements is quite difficult, which is why this condition has been stated in the negative.¹⁴³ Because the question of land ownership and use implicates questions of international law, the condition related to land ownership is considered below as part of the overall discussion of international law.

The condition that Israeli Jewish settlements not prevent the creation of a viable Palestinian state is necessitated by the desirability of the two-state solution. As explored previously, any solution other than two states would eventually mean the cessation of the state of Israel or, as previously discussed, apartheid-like or forced transfer options that would negate Israel’s status as a democracy. The pragmatic condition responds to an argument that has been made even by parties that do not necessarily accept the notion that Jewish settlements are illegal or would interfere with the creation of a viable Palestinian state. If the continuance option is not practical, most particularly if Jews would not want to live in such a state for fear of their safety or based upon other grounds, then the continuance option advanced in this article is at best academic. Both the state viability condition – which

¹⁴² Admittedly, this principle is often violated more in the breach than the observance, as is evidenced by the difficulty of original owners of artwork or land prior to the Holocaust in retrieving or laying successful claim to their property, even in European nations that pledge adherence to this principle.

¹⁴³ The condition, as stated, is that Israeli settlements have not been conclusively demonstrated to be illegal under international law rather than that Israeli settlements be demonstrated to be consistent with international law. This condition is intentionally stated in the negative because of the political nature of the legal arguments. Given their inconclusive character, other arguments – both pro and con the settlements – would seem to be of greater relevance. See *infra* notes 443 to 493, and accompanying text.

deals primarily with Palestinian interests – and the pragmatic condition – which addresses primarily Israeli interests – force us to confront the issue of what it would mean for Israeli Jews to live under Palestinian Arab sovereignty.

A. That Israeli settlements are not demonstrated to be illegal: the occupation, land, and transfer issues

Well over one hundred scholarly works weigh in on the question of whether Israeli settlements are “illegal.”¹⁴⁴ When this body of work gets condensed in the popular press, the dominant notion seems to be the settlements are illegal, and the more popular commentators and politicians hostile to Israel repeat this, the more it is believed.¹⁴⁵ The task here is not to repeat or refute every scholarly argument, but it is interesting to reflect both on the extent to which these arguments have changed over time (somewhat) and the weaknesses inherent in the arguments of both supporters and opponents of the settlements.

The arguments on both sides are well rehearsed and extraordinarily heated.¹⁴⁶ Unfortunately, as Michael Curtis has observed, “[n]o doubt, customary and conventional international law have often been used to buttress tendentious political positions, and it would be unrealistic to expect otherwise.”¹⁴⁷ Commenting on the views of two such scholars who have sought to support Palestinian violence¹⁴⁸, Curtis characterized their argument as “infused with an animus that exceeds the usual boundaries of scholarly discourse while paying scant attention to the realities of the Arab-Israeli conflict.”¹⁴⁹ Some commentators start from such a strong position that the creation of the State of Israel is “unlawful” or “wrongful” that their

¹⁴⁴ See sources cited in Peter Malanczuk, *Israel: Status, Territory and Occupied Territories*, 1468-1508 at 1497-1501, in Rudolf Bernhardt, editor, 2 *ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW*, (1995).

¹⁴⁵ As Martha Minow has noted in reference to the persistence of belief in the Czarist forgery, *Protocols of the Elders of Zion*, “mere resonance and reverberation lends credibility.” Martha Minow, *The Persistence of Falsehood and the Protocols of the Elders of Zion*, 47-55, at 47 in DEBORAH R. KAUFMAN, et al, eds., *FROM THE PROTOCOLS OF THE ELDERS OF ZION TO HOLOCAUST DENIAL TRIALS, CHALLENGING THE MEDIA, THE LAW AND THE ACADEMY* (2006) (forthcoming).

¹⁴⁶ See, e.g., Craig Jackson, *Israeli West Bank Settlements, the Reagan Administration's Policy Toward the Middle East and International Law*, 79 AM. SOC'Y INT'L L. PROC. 217 (1987) (The different remarks made in American Society of International Law Proceedings, April 25-27, 1985).

¹⁴⁷ Curtis, *supra* note 110.

¹⁴⁸ Richard A. Falk, Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991).

¹⁴⁹ Curtis, *supra* note 110.

particular position with respect to Israeli settlements on the West Bank is both predetermined and suspect.¹⁵⁰

International law based arguments concerning Israeli settlements rest primarily upon two sources of international law: the 1907 Hague Regulations¹⁵¹ and the 1949 4th Geneva Convention.¹⁵² In particular, Articles 43,¹⁵³ 46,¹⁵⁴ 52,¹⁵⁵ and 55¹⁵⁶ of the Hague Regulations and paragraph 6 of Article 49¹⁵⁷ of the 4th Geneva Convention have been cited against

¹⁵⁰ See, e.g., W. THOMAS MALLISON, SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* (1986). After starting their study denigrating the concept of a “Jewish people” and the Zionist movement (at 1-17), the Balfour Declaration calling for the creation of a Jewish state in the Palestinian Mandate (at 18-78), the Jewish Agency which acquired by purchase most of the land on which Jewish settlers within the Green Line (the armistice line established between Israel and Jordan in 1949) (at 79-141), and the resolution of the United Nations calling for the creation of two states in the part of the Palestine Mandate west of the Jordan River (at 142-73), their “juridical analysis” of Israeli settlements is totally predictable and pre-ordained (at 240-75). A similar analysis pervades their earlier work, *AN INTERNATIONAL LAW ANALYSIS OF THE MAJOR UNITED NATIONS RESOLUTIONS CONCERNING THE PALESTINE QUESTION* (1979), “prepared and published at the request of the Committee on the Exercise of the Inalienable Rights of the Palestinian People.” See also W.T. Mallison, *Zionist-Israel Juridical Claims*, *supra* note 21.

¹⁵¹ See Convention (IV) Respecting the Laws and Custom of War on Land and its Annex: *Regulations Respecting the Laws and Customs of War on Land* (signed at the Hague, 18 October 1907) (hereinafter, “Hague Regulations”), reprinted in DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* 60-81 (2004) (hereinafter SCHINDLER). While Israel is not a signatory, its Supreme Court has held the regulations to be part of customary international law that is both applicable to Israel and enforceable in its courts as a part of its municipal law.

¹⁵² Convention (IV) Relative to the Protection of Civilian Persons in Time of War (signed at Geneva, 12 August 1949),), FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 (hereinafter, Final Record), Vol I. at 297-335 (William S. Hein & Co. Buffalo 2004), also reprinted in Schindler at 575-631. Although Israel signed the Convention, subject to reservations not here relevant, the Israeli Supreme Court has treated the Convention technically as not binding on Israeli courts in that, as conventional rather than customary international law, it would take an act of the Knesset, Israel’s parliament, to cause the convention to be considered part of Israeli municipal law. Nonetheless, the Israeli Supreme Court has in fact measured the actions of the Israeli military against the Convention. See *infra*, notes 415-26, and accompanying text.

¹⁵³ “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” SCHINDLER, *supra* note 151, at 78. Benvenisti uses the term, “civil life”, deeming it a more accurate translation of the French than the term, “safety”, which has been used in English sources. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 7 (1993).

¹⁵⁴ Paragraph 2 of Article 46 provides: “Private property cannot be confiscated.” SCHINDLER, *supra* note 151, at 78.

¹⁵⁵ Article 52 provides, in part: “Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.” SCHINDLER, *supra* note 151, at 79.

¹⁵⁶ Article 55 provides, in part: “The occupying State shall be regarded only as administrator and usufructuary of ... real estate ... belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.”

¹⁵⁷ Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the

and/or in support of the settlement activity. Article 43 of the Hague Regulations generally obligates an occupying power to “ensure, as far as possible, the public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country”; Article 46 bars the confiscation of private property; Article 52 bars requisitions from municipalities or inhabitants “except for the needs of the army of occupation”; and Article 55 obligates the occupying power to “protect the capital of ...[the real estate of the hostile State], and administer it according to the rules of usufruct.” More generally, these provisions, along with others such as Article 23(g)¹⁵⁸, create a standard of “military necessity” by which to judge the actions of an occupying army. Although the Hague Regulations do protect the inhabitants of an occupied territory, they were primarily designed to protect the interests of a temporarily ousted sovereign¹⁵⁹ in the context of a short-term occupation:

...[T]he Regulations placed emphasis on a settlement whereby reversion of control to the ousted power, in whole or in part, would occur. The predominant theme ... was the provisional character of occupation, wherein the ousted power retains sovereignty, his authority being merely in a state of abeyance. Interference in the

security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies. Final Record, *supra* note 152, Vol. I, at 307; SCHINDLER, *supra* note 151, at 594.

¹⁵⁸ Article 23(g) provides that “it is especially forbidden ... To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” Schindler at 73. Unlike Articles 43, 46, 52 and 55, which are part of Section III of the Hague Regulations dealing with occupied territory, Article 23(g) applies in the context of hostilities, i.e., the warfare prior to belligerent occupancy.

¹⁵⁹ For example, both themes were emphasized in an address made by Alexander Nelidow, the Russian delegate to the Hague Conference and the President of the Conference: “This task ... consists of two parts: on the one hand, we must endeavour to discover a method of settling amicably differences which may arise between States, and thus prevent ruptures and armed conflict. On the other hand, we must endeavour to lighten the burdens of war – in case it breaks out – both as regards the combatants and those may be indirectly affected by it.” JAMES BROWN SCOTT, ED., THE REPORTS TO THE HAGUE CONFERENCES ON 1899 AND 1907, 197 (1917).

ousted power's legislative and institutional system was thus prohibited, for fear of being inimical to the settlement process. ... To preserve the rights and authority of the ousted sovereign, the Hague Conventions proscribed any activity on the part of the occupant that might tend to undercut it, with changes in existing laws and institutions being the foremost concern.¹⁶⁰

In contrast, the 4th Geneva Convention is unabashedly humanitarian law that primarily seeks to protect persons caught up in warfare and its aftermath. Article 49 thereof generally seeks to prohibit the forced movement or use of people; the extraordinarily negative behavioral models primarily underlying Article 49 were the deportations and slave labor practices of the Nazis during World War II, which had a felt immediacy at the 1949 Geneva Conference of delegates and the preparatory conferences that preceded it.¹⁶¹ Paragraph 6 of Article 49 specifically prohibits an occupying power from transferring or deporting its own civilians into occupied territory.

The contentions about the illegality of the settlements usually take one of three inter-related forms, or variants of such: first, the settlements are

¹⁶⁰ ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 9 (1978).

¹⁶¹ Max Petitperre, Head of the Swiss Federal Political Department, who presided over and convened the first plenary session of the Conference considering the Convention, declared, in relation to the 4th Convention: "Most important of all, the second world War showed that the Geneva conventions would be incomplete if they did not also assure the protection of civilians. It has become an imperative necessity to give such persons certain moral and material guarantees. In 1859 it was the groans of the wounded abandoned on the battlefield of Solferino which upset Henry Dunant. Today another still more tragic appeal is being made to us – that of the millions of civilians who perished in the horrors of the concentration camps or died a miserable death, even though they had taken no part in military operations. ¶It lies with us to give civilians the protection which has become a necessity. This is perhaps the most important part of our mission...." Final Record, *supra* note 152, Vol. IIA, at 10. Even more generally, German conduct during World War was the negative paradigm underlying the provisions of the 4th Geneva Convention. Revising perhaps the most prestigious international law text used in the English language after World War II – a revision that took account of the 4th Geneva Convention – Hersh Lauterpacht commented, "In the part devoted to rules of warfare, the account and analysis of the new developments are based, to a considerable extent, on the record of the violation of the law of war by Germany and her allies and of the decisions of the various war crimes tribunals which were called upon to adjudicate upon them." L. OPPENHEIM, INTERNATIONAL LAW A TREATISE, DISPUTES, WAR AND NEUTRALITY, preface at v (Hersh Lauterpacht, ed., David McKay Co. 1952). See also G.I.A.D. DRAPER, *The Historical Background and General Principles of the Geneva Conventions of 1949*, in REFLECTIONS ON LAW AND ARMED CONFLICTS 54, 58 (1998) ("This Civilians' Convention was called into being by the civilized States of the community of nations as a direct result of the experience of the Second world War. In that conflict, as we know, the civilian population suffered in death, torture, and starvation to an extent that has never been witnessed in the recorded history of humankind. In Auschwitz Concentration Camp alone 4 ½ million civilians died by gassing, let alone the tens of thousand who perished there from shooting, flogging, torture, hanging, starvation, typhus and tuberculosis."); G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS (1958) (comments at 26, 34-5, 47-8 all reflect the influence of what became known as the "Holocaust" on the drafting of the 4th Geneva Convention).

illegal because Israel illegally occupies the West Bank; second, the settlements are illegal because they are on “Arab” land and not justified by military necessity under the Hague Regulations; and, third, the settlements, as a transfer by Israel of its citizens into occupied territory, violate paragraph 6 of Article 49 of the 4th Geneva Convention. The corresponding contentions, by supporters of the settlements, stress the disputed nature of the West Bank, the “military necessity” of settlements to combat terrorism and protect Israel from an eastern attack, the “public” or “state” lands on which settlements have been situated since 1979, the voluntary rather than forced nature of the settlement activity, and, in general, either the inapplicability of international law to Israeli actions on the West Bank or the conformity of Israeli actions with that law.

Before the particulars of these conflicting arguments are explored, it is instructive to note the uniqueness of Israel’s position from both an institutional and a temporal perspective. Although the Israeli government’s stance has vacillated with respect to whether the West Bank is “occupied territory” as that concept is understood in either the Hague Regulations or the Geneva Convention,¹⁶² it did in fact establish a military administration overseeing the West Bank in accordance with the Hague Regulations and has also asserted that its conduct with respect to the West Bank and the Palestinians therein conforms to the humanitarian standards of the 4th Geneva Convention. In the words of Eyal Benvenisti, a critic of Israeli settlements, “this is the only occupation since World War II in which a military power has established a distinct military government over occupied areas in accordance with the framework of the law of occupation[, whereas] [a]ll other modern occupants who have assumed control over a foreign territory have rejected this body of laws as inapplicable and irrelevant.”¹⁶³ The singularity of Israel’s position temporally is that its control over the West Bank has continued for close to 40 years. This radically differs from a “classical” sequence of events related to occupation: belligerent occupation

¹⁶² See the brief discussion of this in Benvenisti & Zamir, *supra* note 34, at 305-06.

¹⁶³ BENVENISTI, *supra* note 153, at 107. Geoffrey Best, another party somewhat critical of Israel’s policies, echoes this thought: “Whatever reservations may be discerned behind the Israeli Government’s refusal to recognize the *de jure* applicability of the fourth Geneva convention, it has at least acknowledge ‘the relevance of international legal standards’ as for instance have not, in comparable circumstances, the USSR in Hungary, Czechoslovakia, and Afghanistan, the Republic of South Africa in Namibia, and, one might add, Indonesias in East Timor. Israel’s military authorities have allowed the ICRC considerable freedom of access to the occupied territories and its Supreme Court has affirmed the applicability of the Hague Regulations. It is relevant to remark also that the Israel Defence Forces’ commitment to the three other Geneva Conventions has never been in doubt, and that Israel has permitted an almost unexampled latitude of comment, from within its armed forces as well as from without, on the compatibility of their operations with their legal and ethical obligations.” GEORGE BEST, *WAR AND LAW SINCE 1945* 316 (1994).

is fairly quickly followed by a surrender (post-surrender occupation), which then results in a peace agreement according to which either the defeated sovereign regains control over the occupied territory *status quo ante* or the occupying power retains some or all of the occupied territory, the border having been redrawn between the victorious and defeated nations.¹⁶⁴ Most of the international law of occupation, particularly the Hague Regulations, is premised upon this model of short term rather than long term occupations,¹⁶⁵ making the issue of the applicability of the international law to Israel's occupation of, or control over, the West Bank somewhat especial.¹⁶⁶ In short, there is scant precedent in discussing the legal issues.

1. The "occupation" issue: the question of Israel's legal status on the West Bank

The claim has frequently been made that Israeli settlements on the West Bank are illegal because Israel's occupation of the West Bank is illegal.¹⁶⁷ Such reasoning perhaps falsely equates the two: Israeli settlements on the West Bank might be illegal even if Israel's occupation accords with international law; conversely, Jewish settlements on the West Bank theoretically could be quite legal even if Israel's occupation were illegal. Nonetheless, enough of a connection between occupation and settlements has been drawn to merit review of the differing views regarding the legality of Israel's control over the West Bank, including the legality of its initial occupation, the legality of its continuing occupation, and the implications of those questions on the legality and status of Israeli settlements.

(a) "Disputed" or "Occupied" – the terminological debate

Initially, one might differentiate, however subtly, between a *people* under occupation and a *land* under occupation. From one perspective, all *peoples* not in control over the governing authority and rejecting the legitimacy of that governing authority might be considered *occupied*. So,

¹⁶⁴ GERSON, *supra* note 160, at 2-21.

¹⁶⁵ Benvinisti explores the tension between a body of law primarily directed towards short term contexts and the needs of the people of occupied territory in longer term occupations. *See generally* BENVINISTI *supra* note 153, at 7-31. But even the 4th Geneva Convention has been described as premised on an occupation of "limited and temporary" nature. *See* DRAPER, RED CROSS CONVENTIONS, *supra* note 161, at 39.

¹⁶⁶ BEST *supra* note 163, at 316.

¹⁶⁷ *See, e.g.,* SALLY V. MALLISON & W.T. MALLISON, *The Central Role of Law in the International Peace Conference on the Middle East*, pp.87-100 in QUESTION OF PALESTINE: LEGAL ASPECTS (1992).

for example, the Sunnis in present day Iraq might well consider themselves occupied, in the sense that they both do not control the authority that governs over them and many reject that government. The Palestinians similarly and rightly feel they are under occupation by a power in whose government, army and society they do not participate. To what extent can we also say that the West Bank is occupied territory in a legal sense?

This question of whether Israel is “occupying” territory in a legal sense has been debated as long as Israel has had control over the territory. One problem that has been cited is that “occupation” of a territory implies “the effective control of a power ... over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.”¹⁶⁸ The question then arises: what is the “sovereignty” that Israel’s control over the West Bank cannot negate? Jordan itself occupied the West Bank in 1948, contrary to the General Assembly resolution that called for the creation of a Palestinian state alongside a Jewish state in the territory west of the Jordan River.¹⁶⁹ Its annexation of the West Bank was never recognized internationally, except by Pakistan and Great Britain.

In the aftermath of the 1967 War, Yehuda Blum, an international law scholar later to become Israel’s ambassador to the United Nations, argued that since Transjordan had attacked and occupied the West Bank in an aggressive rather than defensive war, it probably lacked even the status of a “belligerent occupant”¹⁷⁰, with the rights to control the West Bank according to the standards of belligerent occupancy, including the power to regulate it according to military necessity. At best, Jordan was a “belligerent occupant”, but “her rights could not amount to those of a legitimate sovereign ... [a] conclusion which is of decisive legal significance as regards the nature and scope of the present rights of Israel over these territories.”¹⁷¹ Because Jordan could not be considered the sovereign, according to Blum, he described the West Bank as having a “missing reversioner.” Because Jordan had no sovereign right over the West Bank, Israel cannot be said to

¹⁶⁸ BENVINISTI, *supra* note 153, at 4. Indeed, “[t]he foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force.” *Id.* While Article 42 of the 1907 Hague Regulations states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army”, Article 42 is the first article in Section III, entitled, “Military Authority Over *The Territory Of The Hostile State*.” (emphasis added). Schindler, *supra* note 151 at 77.

¹⁶⁹ See G.A. Res. 181 (II), U.N. Doc. A/RES/181 (Nov. 29, 1947), available at <http://domino.un.org/UNISPAL.NSF/a06f2943c226015c85256c40005d359c/7f0af2bd897689b785256c330061d253!OpenDocument>.

¹⁷⁰ Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 292 (1968).

¹⁷¹ *Id.* at 293.

have occupied Jordanian land. Moreover, in Blum's view, because the "assumption of the concurrent existence, in respect of the same territory, of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law[.] ... [T]hose rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights ha[d] no application" to the West Bank.¹⁷² In any event, Jordan itself renounced any claim to the West Bank on July 31, 1988.¹⁷³

Picking up on Blum's analysis – and well prior to Jordan's relinquishment of any claim to the West Bank -- Eugene Rostow, former Dean of Yale Law School and Undersecretary of State for Political Affairs in 1967 during the Six-day War, argued that the West Bank could be considered an "unallocated territory."¹⁷⁴ Having once been part of the no longer existent Ottoman Empire and placed under the trusteeship of the British, the West Bank, in Rostow's view, was still under a trust mandate sanctioned by the League of Nations and continued under Article 80 of the United Nations Charter. From this vantage point, Israel, rather than simply being considered "a belligerent occupant", had the status of a "claimant to the territory." His conclusion, relevant to the subject matter of this paper, was that "Jews have a right to settle in it under the Mandate", a right that he declared to be "unchallengeable as a matter of law."¹⁷⁵

In accord with these views, the Israeli government historically was careful to characterize the West Bank as "disputed territory."¹⁷⁶ Many

¹⁷² *Id.* at 293. See also Curtis, *supra* note 110 at 463-5. Robbie Sobel, *The International Court of Justice Decision on the Separation Barrier and the Green Line*, 38 ISRAEL L. REV. 316 at 318 (2005).

¹⁷³ John Kifner, *Hussein Surrenders Claims on West Bank to the P.L.O.*, N.Y. TIMES, Aug. 1, 1988, late ed. at A1.

¹⁷⁴ Rostow developed this position most fully in Eugene V. Rostow, "Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate, 5 YALE STUD. WORLD PUB. ORD. 147 (1978-79).

¹⁷⁵ Eugene V. Rostow, *Remarks, Israeli West Bank Settlements, The Regan Administration's Policy Toward the Middle East and International Law*, 79 Am. Soc'y Int'l L. Proc. 217, 225 (1987). Rostow reiterated these views in Eugene V. Rostow, *Resolved: are the Settlements Legal? Israeli West Bank Policies*, THE NEW REPUBLIC, Oct. 21, 1991.

¹⁷⁶ Israel Ministry of Foreign Affairs, *Israeli Settlements and International Law*, May 20, 2001, available at, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Settlements+and+International+Law.htm> (hereinafter, "MFA Settlements and International Law") ("Politically, the West Bank ... is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations. Israel has valid claims to title in this territory based not only on its historic and religious connection to the land, and its recognized security needs, but also on the fact that the territory was not under the sovereignty of any state and came under Israeli control in a war of self-defense imposed upon Israel."). Dore Gold, a former Israeli Ambassador to the United Nations, has repeatedly echoed this view. See Dore Gold, *From "Occupied Territories" to "Disputed Territories"*, 470 JERUSALEM LETTER/VIEWPOINTS, Jan. 16, 2002 (Jerusalem Center for Public Affairs), available at <http://www.jcpa.org/jl/vp470.html> (last viewed Oct. 14, 2005).

advocates of Israeli settlements still use that term,¹⁷⁷ while certain other Israeli Jews, many of whom perceive of the West Bank in religious terms, use language indicating an even greater right to Jewish possession of the land. In the eyes of the latter, all of the West Bank “belongs” to Israel, thereby equating *Eretz Yisrael* with *Medinat Yisrael*, the land of Israel with the government of Israel.¹⁷⁸ With greater widespread recognition of the threat that eventual sovereignty over the West Bank posed to Israel’s status as a Jewish state, the “Greater Israel” movement lost much of its former following, and today most Israelis accept the necessity of a two-state solution. More recently, the Israeli government has itself used the term, “occupation”, in a practical if not in a legal sense.

(b) Defensive Occupation

Even if, for purposes of international law, “occupied”, is equally as, if not more, appropriate an appellation than is “disputed” to characterize the West Bank under Israeli control, the analysis cannot stop there. To the extent that the legality of Israeli settlement activity may depend upon the legality of Israel’s occupation of the West Bank, it bears repeating that “occupation” in itself is not unlawful. Yoram Dinstein has articulated why:

Some Arabs claim that belligerent occupation, as such, is intrinsically unlawful. But this is a spurious contention. In every war which is not confined to a Sitzkrieg, armies are on the move. When the situation stabilizes, the zones between the frontiers and the frontlines are subjected to belligerent occupation. While belligerent occupation does not transfer title (sovereignty), it does mean that the occupying Power has a temporary right of possession (which can continue as long as peace is not concluded).¹⁷⁹

Moreover, international law has long recognized a distinction between a lawful occupation – for example, those resulting from an act of self-defense – and an unlawful occupation. From the latter, based upon the principle of

¹⁷⁷ Gold, *supra* note 176.

¹⁷⁸ See, e.g., Mark Rosenblit, *International Law and the Jewish People’s Collective Rights of Settlement and Self-Determination in the Land of Israel*, <http://www.rosenblit.com/Law.htm> (last viewed Oct. 14, 2005).

¹⁷⁹ See Yoram Dinstein, *The International Legal Dimensions of the Arab-Israeli Conflict*, in ALFRED E. KELLERMANN, ET. AL., *ISRAEL AMONG THE NATIONS, INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES ON ISRAEL’S 50TH ANNIVERSARY* 137-54 at 50 (1998).

ex injuria just non oritur, no rights can arise.¹⁸⁰ From the former, annexation of territory not only can result, but has often resulted from war. As Alan Gerson has noted, “[a]ny other rule would impose no sanction on aggressive behavior and thus defeat the basic quest of international law, or any law, in distinguishing lawful from unlawful behavior. A rule or policy requiring lawful entrants to relinquish gains in bargaining power gained in reacting against unlawful behavior would condone aggression and penalize defensive action.”¹⁸¹

(c) The legality of Israel’s initial occupation of the West Bank

Turning to the issue of whether Israel’s initial occupation of the West Bank was lawful, Israel acquired control over the West Bank during the 1967 War, about which volumes have been written.¹⁸² Most impartial observers acknowledge that Israel fired the “first” shot against Egypt, but also that Israel had little choice but to do so: Nasser had imposed a blockade on all Israeli shipping through the Suez Canal and the Straits of Tiran, ordered the UN troops and observers between the Israeli and Egyptian borders to leave (a demand that then UN Secretary General U Thant inexplicably complied with), and had planes fly over Israeli bases.¹⁸³ In short, Israel fired the first shot (attacked the Egyptian airfields) in a context where Egypt had signaled that it was about ready to attack Israel. But more relevant to the present discussion is that Israel, through intermediaries, twice asked Jordan not to attack Israel and join in that war.¹⁸⁴ Only after Jordan rejected these pleas and attacked Israel did the latter capture the remainder of Jerusalem (including the Jewish section of the Old City and the Western Wall, considered the holiest site in Judaism) and the West Bank. The bottom line is that Israel occupied the West Bank in a defensive war, and, as

¹⁸⁰ GERSON, *supra* note 160, at 14.

¹⁸¹ GERSON, *supra* note 160, at 75.

¹⁸² The text that is now considered the “classic” about the war is MICHAEL B. OREN, *SIX DAYS OF WAR, JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2002).

¹⁸³ See Oren, *supra* note 182, at 61-126.

¹⁸⁴ See Arye Naor, *The Six-Day War and Its Aftermath: A Case for Professionalism in Policy Planning* at 7 (manuscript on file): “On the day before the war broke out (4.6.67) Dayan gave the General Staff permission to plan only the conquest of Latrun, which was not to be implemented if the Jordanians did not enter the war. Two messages were sent to King Hussein on the day the war broke out (5.6.67) warning him not to get involved and promising him no harm as long as he did not join in the fray alongside Egypt. The Jordanians responded with artillery fire on civilian and military targets, including Jerusalem and Tel Aviv.”

mentioned, there is no support for the proposition that the occupation of territory in a defensive war violates international law.¹⁸⁵

(d) The legality of Israel's continued occupation of the West Bank

Nor does it appear that Israel's continued control over the West Bank after the cessation of hostilities in 1967 has been illegal. The generally accepted, operative international legal document pertaining to this question is Security Council Resolution 242, passed by the United Nations Security Council in the immediate aftermath of the 1967 War,¹⁸⁶ later supplemented by Resolution 338 passed during the 1973 war.¹⁸⁷ While various resolutions were considered by the Security Council, only the compromise British draft of Resolution 242 was voted upon, and it was adopted unanimously.¹⁸⁸ Its English version called for Israel, in return for "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force", to withdraw from "territories" captured in the 1967 War.¹⁸⁹ Parties who participated in drafting Resolution 242 have testified to the significance and intentionality of the omission of the article, "the", prior to "territories", from the English text, thereby signifying Israel's right to make some border adjustments in the context of a peace settlement with the Arab nations.¹⁹⁰ Israel, of course, has always

¹⁸⁵ See, e.g., Ruth Lapidoth, *Security Council Resolution 242 at Twenty Five*, 26 ISR. L. REV. 295, 303 (1992) (it is generally recognized that occupation resulting from a lawful use of force, i.e. from an act of self-defence, is legitimate").

¹⁸⁶ S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967). For an extended discussion of the drafting history and intent of the resolution, see Lapidoth, *supra* note 185.

¹⁸⁷ S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973).

¹⁸⁸ Lapidoth, *supra* note 185, at 297.

¹⁸⁹ S.C. Res. 242, *supra* note 186.

¹⁹⁰ See Eugene V. Rostow, *Resolved: are the settlements legal? Israel's West Bank Policies*, THE NEW REPUBLIC, October 21, 1991, at 14. Rostow, a former professor and dean of Yale Law School, who served as Undersecretary of State for Political Affairs in 1967, helped draft and negotiate the text of Resolution 242. He wrote: "Resolution 242, which as undersecretary of state for political affairs between 1966 and 1969 I helped produce, calls on the parties to make peace and allows Israel to administer the territories it occupied in 1967 'until a just and lasting peace in the Middle East' is achieved. When such a peace is made, Israel is required to withdraw its armed forces 'from territories' it occupied during the Six-Day War – not from 'the' territories nor from 'all' the territories... Five-and-a-half months of vehement public diplomacy made it perfectly clear what the missing definite article in Resolution 242 means. Ingeniously drafted resolutions calling for withdrawals from 'all' the territories were defeated..." Arthur Goldberg, the United States' representation to the UN at this time echoed this interpretation (see Arthur J. Goldberg, *United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East*, 12 COLUM. J. TRANS. L. 187, 190-91 (1973), as did Lord Caradon, the UK's ambassador to the UN (see

agreed with that interpretation, while Arab nations and Palestinians have always disagreed. As Ruth Lapidoth reports, “Israel’s interpretation is based [not only] on the plain meaning of the English text of the withdrawal clause which was the draft presented by the British delegation[, but also] the fact that proposals to add the words ‘all’ or ‘the’ before ‘territories’ were rejected; and on the idea that in interpreting the withdrawal clause one has to take into consideration the other provisions of the Resolution, including the one on the establishment of ‘secure and recognized boundaries.’”¹⁹¹

Even were one not to accept the fact that Resolution 242 contemplated border changes, Israel was not required to withdraw prior to termination of all states of belligerency against it. Rather than pursuing peace, Arab leaders convened a summit conference in Khartoum, in which they reacted to their defeat in the 1967 War and the resultant UN Security Council Resolution 242 by restating their position that there would be no negotiations, recognition or peace with Israel.¹⁹² Moreover, after Jordan relinquished its claim to sovereignty in the West Bank, no entity existed with which even to negotiate an Israeli withdrawal until, in 1993, Israel and the Palestine Liberation Organization signed the Oslo Accords,¹⁹³ pursuant to which the Palestinian Authority was established.

Later interim accords between Israel and the Palestinian Authority led to greater degrees of Palestinian self-government and control over the West Bank¹⁹⁴ – Israeli settlements and external border controls, excepted – until the breakdown of the very extended negotiations in 2000 between Israel and the Palestinian Authority, first at Camp David and then at Taba. That

Lapidoth, *supra* note 185 at 307-10; The Washington Institute for Near East Policy, *supra* note 58, at 27-8). Specifically, a return to the 1949 armistice lines was not called for because “it was felt that a return to those lines would not guarantee peace in the area as the 1957 precedent had proven.” Lapidoth, *supra* note 185, at 296 (the reference is to the withdrawal of Israel from the Sinai peninsula in 1957 in return for guarantees of safe shipping through the Suez Canal).

¹⁹¹ Lapidoth, *supra* note 185, at 307.

¹⁹² See Israel Ministry of Foreign Affairs, *The Khartoum Resolutions* (Sep. 1, 1967), available at <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Khartoum%20Resolutions>.

¹⁹³ Israel Ministry of Foreign Affairs, *Declaration of Principles on Interim Self-government Arrangements*, September 13, 1993, <http://www.israel-mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm> (last viewed Jan. 20, 2006).

¹⁹⁴ These include: [Agreement on the Gaza Strip and the Jericho Area](#), May 4, 1994; [Agreement on the Preparatory Transfer of Powers and Responsibilities](#) (Israel-PLO), August 29, 1994; Interim Agreement between Israel and the Palestinians, September 28, 1995; [Summit of Peacemakers - Final Statement](#) (Sharm el-Sheikh, March 13, 1996); [Agreement on Temporary International Presence in Hebron](#), May 9, 1996; [Protocol Concerning the Redeployment in Hebron](#), January 17, 1997; [Agreement on Temporary International Presence in Hebron](#), January 21, 1997; and the [The Wye River Memorandum](#), October 23, 1998. These are available at Israel Ministry of Foreign Affairs, <http://www.mfa.gov.il/mfa/peace/process/reference%20documents/> (last viewed Feb. 14, 2006).

breakdown was followed by the second Palestinian *intifada* and the renewal of Israeli military control over West Bank population centers. Most well-placed observers¹⁹⁵ have placed the onus for that breakdown on the Palestinian Authority and its then head, Yasir Arafat. While it may have been possible for Israel unilaterally to have withdrawn from Gaza¹⁹⁶ and a substantial percentage of Israel's population wants to repeat the exercise on the West Bank,¹⁹⁷ withdrawal from the West Bank without a peace treaty is much more difficult. The West Bank lies contiguous for several hundred miles to Israel's heartland. For the same reason, Israel lacks the same option allegedly available to other nations, for example, the United States in Iraq¹⁹⁸, of simply deciding to withdraw.

(e) Relationship between lawful occupation and Jewish settlements

If one is prepared to accept the fact that Israel's occupation of the West Bank is lawful but would not accept the Blum/Rostow position that Israel's rights to the West Bank exceed that of a occupying power, how do the Israeli Jewish settlements on the West Bank fare under the Hague Regulations? Response to the question is most difficult for two reasons previously noted: Jordan's own abrogation of any claim to sovereignty over the West Bank; and the admittedly short term occupations envisioned by the Hague Regulations.

Consistent with Article 43 of the Hague Regulations,¹⁹⁹ which calls on the occupant "to respect[...], unless absolutely prevented, the laws in force

¹⁹⁵ See, e.g., BILL CLINTON, MY LIFE 937-38 & 943-45 (2004) ("Arafat's rejection of my proposal after Barak accepted it was an error of historic proportions." *Id.* at 943-45). See also DENNIS ROSS, THE MISSING PEACE, *supra* note 48, at 753-58 ("Barak says yes; Arafat Equivocates"); SHLOMO BEN-AMI, SCARS OF WAR, WOUNDS OF PEACE, THE ISRAELI ARAB TRAGEDY 270-77 (2006). But see Robert Malley & Hussein Agla, *supra* note 116,. Malley and Agla's revisionism was followed by interchanges between them and Dennis Ross and Gidi Grinstein, writing separate letters (N.Y. REV. OF BOOKS, Sep. 20, 2001 at 90-1) and with Benny Morris and Ehud Barak (N.Y. REV. OF BOOKS, June 13, 2002, at 42-5 and June 27, 2002, at 47-9). Yet Malley and Agla seem to put more stress on what they perceive as the flawed process of the negotiations than the substance. Even they conceded that, "If there is one issue that Israelis agree on, it is that Barak broke every conceivable taboo and went as far as any Israeli prime minister had gone or could go", and that "the Palestinians' principal failing is that from the beginning of the Camp David summit onward they were unable either to say yes to the American ideas or to present a cogent and specific counterproposal of their own." Robert Malley & Hussein Agla, *supra* note 116, at 62.

¹⁹⁶ This is still the subject of some debate in light of continued attacks, particularly Qassam rockets, from Gaza. See *infra* note 210.

¹⁹⁷ See Karby Leggett, *Israel's next Struggle May be Internal*, WALL ST. J., Feb. 13, 2006, at A6.

¹⁹⁸ See, e.g., a suggestion to this effect by Theodore C. Sorenson & Arthur Schlesinger Jr., *What Would J.F.K. Have Done?*, N.Y. TIMES, Dec. 4, 2005, late ed., Sec. 4 at 13.

¹⁹⁹ *Supra* note 153.

in the country”, Israel has for the most part continued to follow Jordanian law on the West Bank, despite its position that Jordan was an illegal occupant of the West Bank. Israel’s stance has been criticized as contradictory,²⁰⁰ but general continuance of Jordanian law by the military administration can be justified on grounds of legal stability, long-term reliance and other policy and equitable grounds reflected in international as well as other law. Israel, however, has distinctly abrogated Jordanian law that makes it a capital offense to sell land to Jews. It is inconceivable that any country would subscribe to such a law against its own citizens,²⁰¹ any more than the new State of Israel in 1948 would “give effect to the White Paper of 1939 regarding the prohibition of land sales to Jews, and the prohibition of Jewish immigration into the country”²⁰² or the American occupation of Germany following World War II would continue to implement the Aryan laws against the Jews.

Most Israeli settlements on the West Bank are not on land purchased by Jews, however. While some early settlements, particularly several early ones established in the Jordan Valley according to the Allon Plan under Labor-led governments, were on land requisitioned from Arab owners, the great bulk of Jewish settlements, and substantially all established legally under Israeli law after 1979, were established on “state” or “public” lands. This development and the controversy over these lands is explored more fully in Part III.A.2 of this article. For now, it is relevant to note that two of the most cogent arguments made against the settlements on the basis of the Hague Regulations are: 1) the incompatibility of *civilian* settlements and a justification based upon *military* necessity under Article 52 (the requisitioning of private property), and 2) the incompatibility of seemingly *permanent* civilian settlements with the obligation of an occupying power, consistent with military necessity, to ensure the continued civil life of the occupants of the territory under Article 43 – arguably to maintain the *status quo ante* -- and to hold real estate belonging to the hostile state as a usufructuary²⁰³ under Article 55 of the Hague Regulations.²⁰⁴

²⁰⁰ Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 AM. J. INT’L L. 44, 98 (1990).

²⁰¹ As Alan Gerson points out, the “absolutely prevented” language in article 43 of the Hague Regulations, as well as limitations in its other articles, “have been interpreted rather liberally rather than literally.” GERSON, *supra* note 160, at 8.

²⁰² Shabtai Rosenne, *Revisiting Some Legal Aspects of the Transition from Mandate to Independence: December 1947—15 May 1948*, in ALFRED E. KELLERMANN, ET. AL., ISRAEL AMONG THE NATIONS, at 318 (1998)

²⁰³ “Usufruct” is a right of use, whose roots extend back to Roman law. According to Von Glahn, “[i]n accordance with Roman law (*ususfructus est jus alienis rebus utendi, fruendi, salva rerum substantia*) the occupant is obliged to respect the substance, the capital, of the enemy public property but is entitled to its

Few would dispute the initial strategic relevance of the earliest settlements established according to the Allon Plan,²⁰⁵ primarily in the Jordan Valley. Recent instances of terrorism in Jordan or emanating from terrorist groups with headquarters in Syria have reinforced the view that an Israeli presence on the West Bank is still necessitated to deter terrorism and other threats from sources to the east of Israel,²⁰⁶ although debate continues about whether military bases or civilian settlements best serve that strategic function. Elsewhere on the West Bank, perhaps the most contentious settlements are those located across and to the west of the central mountain ridge of the West Bank, fairly close to Palestinian populated areas. But while it has been contended that these settlements have inhibited the expansion of Palestinian communities and economic activity,²⁰⁷ it is also true that these settlements may also inhibit Palestinian terrorism.²⁰⁸ The

use and to compel control over the product or proceeds arising out of the property in question.” GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY*, 176-77 (1957).

²⁰⁴ In urging this incompatibility or inconsistency between settlements and the occupying power’s obligations under the Hague Regulations, Kretzmer, among others, would stress the *intention* of the settlers to settle the land permanently and, beginning in the late 1970’s, of the Likud government that encouraged settlement, rather than the observable fact that settlements were removed, both from Sinai in the earlier Egyptian-Israel peace treaty and later from Gaza as a unilateral move on Israel’s part. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE, THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 88, 93 (2002). Kretzmer’s stress on the settlers’ intention accords with the Israeli Supreme Court’s own emphasis on the settlers’ intentions in the *Elon Moreh* case. See *infra*, notes 228 to 242, and accompanying text. But, in that case, the court focused upon the settlers’ intention in the context of discussing the reason for the establishment of the settlement not the question of the permanence of the settlement. Moreover, a charge of illegality under Article 55 may be the opponents’ weakest claim in that, once Jordan relinquished any claim to the West Bank, it would seem impossible to conclude that public lands on the West Bank are “real estate belonging to a hostile state.”

²⁰⁵ Yigal Allon, who served as head of the Ministerial Committee on Settlements in the latter 1960’s and early 1970’s, prepared a strategic plan for the establishment of settlements on the West Bank, “which the plan’s proponents argued was necessary to ensure state security.” Lein, *supra* note 29, at 12. It was this plan that was followed during the Labor governments that lasted until 1977. See Lein, *supra* note 29, at 12-13.

²⁰⁶ See Dore Gold & Johnathan D. Halevi, *Al-Qaeda, Zarqawi, and Israel: Is There a New Jihadi Threat Destabilizing the Eastern Front*, Jan. 1, 2006, available at <http://www.jcpa.org/jl/vp538.htm> (last viewed Jan. 17, 2006). A group of Israeli defense experts has opined, in particular, that it would be dangerous for Israel to relinquish control of the Jordan Valley. See Rafael D. Frankel, *Defensible Borders are Key to Israel’s Safety*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1137605901492&pagename=JPost%2FJPArticle%2FShowFull> (updated Jan. 24, 2006); Moshe Ya’alon [a past, recent chief of Israel Defense Forces], *The Security Implications of a Hamas-Led Palestinian Authority*, Feb. 16, 2006, available at <http://www.washingtoninstitute.org/templateC05.php?CID=2444> (last viewed Feb. 21, 2006); Yaakov Katz, *Naveh: Zarqawi Trying to get Better Grip*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1139395468413&pagename=JPost%2FJPArticle%2FShowFull> (Feb. 22, 2006) (remarks by Central Command Maj. Gen. Yair Navey to the effect that the Jordan Valley is a “strategic security asset” in fighting terrorism).

²⁰⁷ Lein, *supra* note 29, at 96-102.

²⁰⁸ See, e.g., Amir Buhbut, *The Rockets are Getting Closer: IDF Finds Kassam in West Bank*, Maariv (in Hebrew), Feb. 22, 2006, <http://www.nrg.co.il/online/1/ART1/051/546.html> (last viewed Feb. 22, 2006).

proximity of some of the most contested areas to Ben Gurion Airport and Israel's major population centers is a subject of considerable concern.²⁰⁹ The showering of Qassam rockets from the Gaza Strip, most frequently in the territory that had been occupied by Israeli settlements, strengthens the argument that civilian settlements serve as a security buffer and undercuts the theory that they play no strategic or military role.²¹⁰ In a context of the reality of terrorism, disrupting the "territorial contiguity of Palestinian communities"²¹¹ does have both negative and positive effects. In the context of an absence of terrorism and the protection of all, neither effect would be felt or relevant.

Recent history also undermines the argument that there is an inherent contradiction between seemingly permanent civilian settlements and Israel's rights and obligations under Articles 43, 52 and 55 of the Hague Regulations. The very fact that Israel has evacuated and removed or destroyed civilian settlements -- first in Sinai after the Egyptian-Israeli peace treaty, in Gaza, and in the West Bank at the same time as the Gaza withdrawal and subsequently -- demonstrates that West Bank settlements can be removed. The question, of course, remains whether they should be. To explore this question more fully, it is necessary to inquire into the question of whether these settlements have been established on "Arab" land.

2. The "Land" Issue: the charge that Israeli settlements have been illegally placed on "Arab" land

²⁰⁹ See Ya'alon, *supra* note 206.

²¹⁰ See Boaz Ganor, *Don't be Fooled by Calm, Israel Continues to Face Three Strategic Threats*, Jan. 16, 2006, <http://www.ynetnews.com/articles/0,7340,L-3201230,00.html> ("The vacuum created in the Gaza Strip after Israel's departure and Abbas' failure have allowed global Jihad to rank up its terrorist abilities in Gaza, and eventually they will probably do so in the West Bank as well."); Moshe Arens, *The Wages of Unilateralism*, HAARETZ, <http://www.haaretz.com/hasen/spages/676700.html> (last updated Jan. 31, 2006) ("in August 2005 Israelis were forcibly removed from their homes in gush Katif . . . , while Kassam rocket launching sites were allowed to move into areas formally occupied by the settlements of Elei Sinai, Nissanit, and Dugit, thus moving them into range of Ashkelon, one of Israel's larger cities."); Amos Harel, *Two Killed in Ninth Targeted Killing in last Four Days*, HAARETZ, <http://www.haaretz.com/hasen/spages/680070.html> (last updated Feb. 8, 2006) ("...the Israel Defense Forces have resumed enforcing a 'no man's land' in northern Gaza that Palestinians are not allowed to enter. This area, the site of three former Israeli settlements, has been a favorite launch site for Qassam crews."); Margot Dudkevitch, *IDF Troops Kill 5 Palestinians in Ongoing Nablus Operation*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1139395468741&pagename=JPost%2FJPArticle%2FShowFull> (Feb. 23, 2006) ("five Kassam rockets were fired into the Western Negev from the former Gaza Strip settlement of Dugit"); Aaron Lerner, *Israel radio: Palestinians Launching Rockets from Abandoned Communities on Northern Gaza Border*, Dec. 16, 2005, <http://www.imra.org.il/story.php?id=27832> ("Palestinians are now exploiting the abandon Israeli communities on the norther border of the Gaza Strip as rocket launching sites that are considerably closer to such strategic Israeli targets as a power plant and a large fuel storage area located south of Ashkelon").

²¹¹ Lein, *supra* note 29, at 102.

This commonly made and accepted charge merits deconstruction, as it conflates and therefore masks several different possible assertions: first, that Jewish settlements have been established by expropriating or requisitioning²¹² -- the latter without military necessity -- privately owned Arab land; or second, that settlements have been established on land belonging to specific Arab villages or communities; or, third, that the land, while not privately owned by individual Arabs or collectively owned by certain Arab communities, belongs to a general Arab “polity” having rights to the land. Each of these assertions bears exploration, both in terms of its own validity as well as the different implications flowing from each. Each is also, in large part, dependent upon the proper characterization of the land upon which most settlements lie.

(a) Privately owned Arab land

Excluding Jewish development in East Jerusalem,²¹³ a few early Jewish settlements constructed on uncultivated land specifically requisitioned²¹⁴ for military needs, and some West Bank outposts established by Israeli Jews without permission of the military administration – regarded by Israel as illegal²¹⁵ -- substantially no present Jewish settlement on the

²¹² “Expropriation” usually refers to a taking of land without compensation although it might refer to a taking of land with compensation (in American terms, “eminent domain”). The former would clearly violate the second paragraph of Article 45 of the Hague Regulations as a “confiscation of private property.” “Requisition”, which under Article 52 of the Hague Regulations “shall not be demanded ... except for the needs of the army of occupation” – that is, on grounds of military necessity – retains original ownership, but involves use by the occupant for a fee. One can see requisitioning as similar to rental, except by involuntary rather than voluntary transaction.

²¹³ This exclusion seems reasonable in that most realists acknowledge that Jewish neighborhoods in Jerusalem, regardless of whether the territory is characterized as East or West, would remain part of Israel in any final settlement. Hence, the subject matter of this article pertains to those areas that would most probably become part of a Palestinian juridical entity.

²¹⁴ As the Israeli Supreme Court noted in *Mara’be v. Prime Minister of Israel*, HCJ 7957/04 [2005], available at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html>, requisitioning of property differs from expropriation, does not involve a change of ownership, but rather a change in possession: “Taking of possession is temporary. The seizure order orders its date of termination. Taking of possession is accompanied by payment of compensation for the damage caused. Such taking of possession – which is not related in any way to expropriation – is permissible according to the law of belligerent occupation (see regulations 43 and 52 of *Hague Regulations*, and §53 of *The Fourth Geneva Convention*...)” *Id.* at 10.

²¹⁵ See the Sason Report, *supra* note 2; Yuval Yoaz, Zmos Harel and Nadav Shragai, *IDF and Hebron Settlers Holding Secret Talks on Evacuation of Market Area*, HAARETZ, <http://www.haaretz.com/hasen/spages/676051.html> (updated Jan. 29, 2006) (the Israeli Supreme Court turned down a petition to halt the evacuation of Amona, an illegal settlement that has become a focal point of dispute between settlement activists and the government). But see the plea of one observer to have the evacuation delayed, partly on the grounds that there are numerous Arab housing projects that have been

West Bank has been established on land that Israel considers to be privately owned. With some exceptions,²¹⁶ nor have settlements generally been established even on land that was privately owned by Jews prior to 1948. Despite Israel's reversal of Jordanian law barring the sale or ownership of land by Jews, Israel has "de facto recognized the actions carried out by Jordan regarding the property of Israelis."²¹⁷ And Jordan, under its "trading with an enemy" corpus of law, both statutory and administrative, regarded Jewish-owned land as state land. The upshot is that, contrary to popular opinion, substantially all Israeli settlements established after 1979 are either on land purchased by Jews from Arabs after 1967²¹⁸ -- a small minority of settlements -- or on property designated as "state land." To understand this development requires, in turn, a review of two seminal Israeli Supreme Court cases decided in 1979 -- *Ayub v. Minister of Defence*, popularly known as the *Beth-El* case,²¹⁹ and *Douykat v. Government of Israel*, popularly known as the *Elon Moreh* case²²⁰ -- as well as an understanding of the role of Israel's Supreme Court in relation to the Israeli government and military.²²¹

built illegally but not torn down. Nadav Shragai, *Compromise Building in the Outposts*, HAARETZ, <http://www.haaretz.com/hasen/spages/675859.html> (updated Jan. 29, 2006).

²¹⁶ Benvenisti & Zamir, *supra* note 34, at 311.

²¹⁷ Benvenisti & Zamir, *supra* note 34, at 302. Interestingly, even land owned by Israelis in East Jerusalem have not been returned to their owners. According to Benvenisti & Zamir, "such practical recognition [of the Jordanian treatment of such property] is ... found in the fact that Israeli assets that were purchased or used for public purposes during the Jordanian rule, and for which the public need did not cease after 1967, were not returned to their owners. In these cases, the owners receive monetary compensation only." *Id.* at 309. The authors relate that, after 1967, the Israeli military authorities faced two choices: either to return the property to their original owners or to administer the property as the Jordanians had. They then explore why, despite both logical (how could a branch of the Israeli government treat its own citizens as "enemies"?) and humanitarian ("Injuries caused to individuals as a result of war should be minimized to the extent possible.") reasons, the military authorities selected the latter alternative, that is, to continue the Jordanian treatment of Jewish owned property on the West Bank. The net result was that Jewish owned land, as happened with Arab absentee owned land, became public property. *Id.* at 313. A somewhat related question is the fate of land owned by Jews prior to the establishment of Israel and sought to be inhabited by Jews in the territories, although not those Jews having claims based upon original ownership. An illustration is the attempt by Jews to settle in houses in the market in Hebron, which were owned by Jews prior to the massacre of Jews in Hebron in 1929; the Israeli government considers such settlement illegal and, following court orders to evict the settlers, has done so. See Amos Harel, *Hebron Settlers Clash with Troops Issuing Evacuation Orders*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/665699.html> (updated Jan. 3, 2006).

²¹⁸ Benvenisti & Zamir, *supra* note 34, at 299.

²¹⁹ *Ayub v. Minister of Defence* ("Bet-El") (1979) 33 P.D. (2) 113. translated in MEIR SHAMGAR, ED., MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980 THE LEGAL ASPECTS, Vol. 1, at 371 (Hebrew University Faculty of Law, Jerusalem 1982).

²²⁰ *Douykat v. Government of Israel* ("Elon Moreh"), 34(1)PD 1, 13 (1979 or 1980?) 34 P.D. (1) 10, translated in SHAMGAR, *supra* note 219, at 404-41.

²²¹ Pnina Lahav credits two features of the Judges Law, enacted in 1953, as key factors in the Court's independence: judicial tenure; and the selection of judges by committee which replaced a political process with one that "emphasized ... professionalism and apolitical content of judicial decision-making. See

The Israeli Supreme Court, sitting as a High Court of Justice,²²² has considered claims of international law violations made against the Israeli government or military to a degree unimaginable in the case of other national courts with respect to actions of their governments or military in armed conflict contexts. As Eyal Benvenisti has noted, “[a]lthough the legality of occupation measures has been examined by many national courts on various occasions, never have these measures been scrutinized by the occupant’s own judicial system.”²²³ While “[t]he Act of State doctrine (in the British or American sense), the sovereign immunity doctrine . . . , and questions of justiciability and standing have proved to be high hurdles for claimants in other jurisdictions, . . . the [Israeli] Supreme Court has flatly and consistently rejected these arguments.”²²⁴ In *Beth-El*, the Court dealt with

Pnina Lahav, *The Supreme Court of Israel: Formative Years, 1948-1955*, 11 STUDIES IN ZIONISM, no. 1, 45-66 at 55 (1990).

²²² For a description of the dual roles of the Israeli Supreme Court, both as an appellate court from district court decisions, and as a High Court of Justice, see KRETZMER, *supra* note 204, at 10-11.

²²³ Eyal Benvenisti, *Judicial Review of Administrative Action in the Territories Occupied in 1967*, in ITZHAK ZAMIR & ALLEN ZYSBLAT, PUBLIC LAW IN ISRAEL 371-78, 372 (1996). Benvenisti adds: “Indeed, the [Israeli] Supreme Court’s willingness to permit judicial review of occupation measures stands in marked contrast to the attitude of the U.S. courts, which refused to entertain claims of Panamanian citizens and firms against the U.S. military, following the occupation of Panama in December 1989.” *Id.* Allan Gerson made much the same point in an earlier work, when he asked the question, “Does the occupied populace, however, have a right under international law to appeal to domestic courts of the occupant for the purpose of questioning whether military orders and promulgations were within the scope of the issuer’s legitimate authority?” GERSON, *supra* note 160, at 127. Gerson answered, “In no instance of belligerent occupation, other than the Israeli case, is there any record of such practice.” *Id.*

²²⁴ *Id.* at 374. Kretzner, *supra* note 204 at 19-25, elaborates on the Court’s assumption of jurisdiction (initially, perhaps on account of the government not contesting such) and its bypassing questions of justiciability and standing that have characterized courts of other nations in similar contexts. Another opponent of the settlers, Adam Roberts, expressed somewhat similar views, comparing Israel’s position with that of other countries:

“Israel deserves credit for acknowledging openly, albeit inadequately, the relevance of international legal standards. Its position contrasts with those of the many occupying powers in the past 40 years that have avoided expressing any view on the applicability of international legal agreements: such powers have included the Soviet Union in Hungary (1956), Czechoslovakia (1968) and Afghanistan (1979); and South Africa in Namibia. Israel also deserves credit for cooperating with the International Committee of the Red Cross, which has played an important role in the occupied territories by performing a wide range of tasks, including, in particular, monitoring conditions of detention.” Roberts, *supra* note 200, at 63.

A recent example of a case that the Israeli Supreme Court seems destined to rule upon involves the Israeli military’s practice of targeting terrorists when physical arrest seems impossible in light of the refusal of the Palestinian Authority to do so. See Ze’ev Segal, *Targeting the High Court*, HAARETZ, <http://www.haaretz.com/hasen/spages/656512.html> (last updated Dec. 12, 2005).

On the other hand, like the United States Supreme Court, the Israeli Supreme Court will refuse to decide a case brought in the absence of a concrete dispute which is predominantly political in nature. For this reason, in *Bargil v. Government of Israel*, HJC 4481/91 [1993], available at <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html>, a three-judge panel of the Israeli Supreme Court, sitting as the High Court of Justice, refused to hear a general political challenge to civilian settlements in the West Bank and Gaza.

the issue of whether military authorities could requisition private property²²⁵ for a civilian settlement upon proof of military necessity. *Elon Moreh* explored more deeply the definition of military necessity and thereafter effectively precluded further requisitioning of Palestinian privately-held land for civilian settlements, no matter the claim of military necessity.

The *Beth-El* decision actually involved two different cases in which Palestinian petitioners sought relief for lands which had been requisitioned by the military for the use of civilian settlements. In one of these cases, *Beth-El*, the owners neither resided on nor cultivated the land, while in the other, *Beka'ot*, the petitioners had cultivated the land. In both cases, the petitioners challenged the consistency of justifying the requisition of land on grounds of military necessity and its use for civilian settlements. They also challenged more generally the legality of such requisitioning under international law.

Writing the court's majority opinion, Judge Witkon rejected the contention that use of land for civilian settlement is necessarily contradictory to its taking based upon military necessity. He stressed the strategic location of both settlements,²²⁶ the threat of terrorism, the reservist nature of the Israeli Army and the reluctance of the court to substitute its judgment for that of the military, even if the latter's views corresponded to those of a civilian government that favored Jewish settlement on the West Bank.

Turning to the claim of international law violations, Judge Witkon affirmed the template that was, with some later modifications (particularly, during the presidency of Aharon Barak), used by the Supreme Court in later cases: that paragraph 6 of Article 49 of the Geneva Convention did not reflect customary international law (although the court did not dispute that certain other provisions of the Geneva Convention might have) and as "a conventional provision ... the petitioners ... [could] not rely on it" before the court; but that the Hague Regulations, having become customary international law, could be used by the petitioners. Focusing upon Article 52 of the Hague Regulations, which specifically sustains requisition for "the needs of the army of occupation," Witkon then dealt with the divergent interpretations of that standard, whether quite narrow, as alleged by the petitioners, or more expansive, as alleged by the Israeli government. The court accepted the government's argument as to the appropriate

²²⁵ For the distinction between expropriation and requisitioning, *see supra* note 212.

²²⁶ The court, for example, relied upon the affidavit of Major-General Avraham Orly that the "Bet El camp is situated in a place of great importance from a security point of view...evidenced by the fact that it was previously a Jordanian camp. The settlement itself is on an elevation commanding the vitally important junction of the longitudinal Jerusalem-Nablus route and the Transverse route from the Coastal Plain to Jericho and the Jordan Valley." SHAMGAR, *supra* note 219, at 386.

interpretation of Article 52 for much the same reason that it had decided that military necessity would be accepted as the ground for the settlements, i.e., terrorist attacks and the like.²²⁷

It should be noted that one argument advanced by counsel for the petitioners was one that has been used by subsequent critics of Israeli settlements: “how a permanent settlement can be established on land requisitioned only for temporary use.” To this Witkon responded, “This occupation can itself come to an end some day as a result of international negotiations leading to a new arrangement which will take effect under international law and determine the fate of ... settlements in the Administered Territories.”²²⁸ This argument would have attained much greater importance over the years were it not for the consequences of the *Elon Moreh* case.

In that case, the military government had requisitioned 700 dunams of land for a civilian settlement within the borders of a village, Rujeib, close to Nablus and approximately two kilometers from the Jerusalem-Nablus Road. Although the land requisitioned for the settlement was uncultivated, seventeen Arabs who had plots of land totaling 125 dunams within the area of the requisitioned land successfully challenged the action before the Israeli Supreme Court.²²⁹ *Elon Moreh* can be analyzed on several different levels, including the facts of the case (especially those that differentiate the case from the facts recognized by the Court in *Beth-El*), the tenor of the justices’ opinions, the actual reasoning employed, and, most importantly for present purposes, the enormous effect of the opinion on the building of future settlements. The case produced three different opinions, one by Justice Landau, Deputy President of the Court (in which two other justices concurred), and separate concurring opinions by Justices Witkin and Bekhor.

²²⁷ Ironically, the aftermath of Israel’s withdrawal from Gaza has strengthened the argument that settlements serve as a security buffer. Recently, Palestinian rockets fired from the premises of former Israeli settlements have reached the outskirts of Ashkelon, a major Israeli city. See Aaron Lerner, *Israel Radio: Palestinians Launching Rockets from Abandoned Communities on Northern Gaza Border*, Dec. 16, 2005, <http://www.imra.org.il/story.php3?id=27832> (“Palestinians are now exploiting the abandon Israeli communities on the norther border of the Gaza Strip as rocket launching sites that are considerably closer to such strategic Israeli targets as a power plant and a large fuel storage area located south of Ashkelon”). See also, *supra* note 210.

²²⁸ SHAMGAR, *supra* note 219, at 392. Judge Ben-Porat, concurring, argued that “the word ‘permanent’ must be taken in a relative sense”, stressing the continuing state of emergency that Israel had found itself for its first 30 years. SHAMGAR, *supra* note 219, at 386.

²²⁹ Technically, the landowners petitioned the court for an *order nisi* against the Government of Israel, the Minister of Defense, the Military Commander of the West Bank and the Military Subcommander of the Nablus Subdistrict directing them to show cause why the requisition orders should not be declared void and why the equipment and structures on the land should not be removed. An interim order was issued, which, as a result of the court’s judgment, became absolute.

The opinions painted a rather negative picture of the settlers and their actions. Landau's opinion was highly critical of the speed with which the requisition and initial construction occurred and the impropriety of the military governor having given notice to the village *mukhtar* rather than the actual landowners – steps that created “the impression ... the occupation of the land was organized as a military operation by employing an element of surprise and in order to forestall the ‘danger’ of intervention by ... [the] Court on an application by the landowners before work began in the area.”²³⁰ Witkin stated that he “[did] not wish to refer to incidents ... in which members of Gush Emunim (among them the settlers before us) were shown to be people who do not accept the authority of the Army and do not even hesitate to give violent expression to their opposition”²³¹, but, of course, Witkon did precisely the opposite by mentioning such. In short, the die was cast, although none of the opinions explicitly made their judgment in favor of the Palestinian landowners dependent upon these negative depictions of the settlers.

The government and military first tried to argue that the requisition could be justified under a 1948 ordinance by the Provisional Council of State, “regard[ing] the State of Israel as possessing sovereignty over all of the land of Israel (Palestine).”²³² The justices rejected that position: “In dealing with the legal basis of Israeli rule in Judea and Samaria, our concern is with legal norms which exist in fact and not only in theory, and the basic norm upon which the structure of Israeli rule in Judea and Samaria [the West Bank] was erected is still today...the norm of military government and not the application of Israeli law than entails Israeli sovereignty.”²³³ In other words, Israel's rights on the West Bank would be judged in terms of its status as an occupier.

In accordance with the earlier *Beth-El* decision, all justices then accepted the applicability of the Hague Regulations, as part of customary international law, to the actions of the Israel's Military Authority (regardless of the legality of Jordan's occupation of the West Bank). And the standard for adjudging the Military Authority's actions was that of military necessity under Article 52 of the Hague Regulations. Distinguishing *Elon Moreh* from *Beth-El*, the court concluded that the *Elon Moreh* requisition primarily reflected a political response to the settlers' desires rather than calculated military necessity. Indeed, important facts pointed to both the lack of

²³⁰ SHAMGAR, *supra* note 219, at 407.

²³¹ *Id.* at 435

²³² *Id.* at 417.

²³³ *Id.*

military necessity and to the political nature of the decision that had been taken.

While the Chief of General Staff took the position that the settlement was militarily required, an affidavit filed by him and other evidence indicated that the Minister of Defense had initially disagreed.²³⁴ And the “military necessity” claimed was based upon a generalized notion of “the importance of regional defence”²³⁵ in the context of war, rather than the comparable justification – protection against terrorist activity -- offered in the *Beth-El* case.²³⁶ Moreover, several high-ranking reserve officers had opined in their affidavits filed with the court that *Elon Moreh* would be a settlement without military value and, if anything, would consume military resources in protecting the settlers and settlements in a time of war.²³⁷

The settlers did not help their own case. Unlike in *Beth-El*, they were permitted to file affidavits of their own, and, in one such affidavit, a settler “explained that the members ... had settled at *Elon Moreh* because of the Divine commandment to inherit the land given to our forefathers...”²³⁸ Both the content of the various affidavits as well as the history of *Elon Moreh* convinced the court that politics came first and the conclusion of military necessity followed as, at best, a secondary motivation for the settlement.²³⁹ To Justice Landau, implicitly,²⁴⁰ and to Justice Witkin, explicitly,²⁴¹ the government bore the burden of proof on the issue of military necessity. Without so declaring, this position seemed to have been a procedural shift from its earlier decision in *Beth-El*. Justice Landau stressed “that the military needs referred to in ... Article [52 of the Hague Regulations] cannot include, on any reasonable interpretation, national-security needs in the broad sense”²⁴², that is, the broad political perspective of the Government and settlers. And, while military necessity could conceivably include the regional defense justification used by the Chief of General Staff in his

²³⁴ The Minister of Defense had later gone along with the decision, based upon the fact that the Defense Ministerial Committee, which the Prime Minister chaired, had come to a positive decision on the settlement.

²³⁵ SHAMGAR, *supra* note 219, at 408.

²³⁶ The comparable justification in *Beth-El* was that terrorist activity was impeded by careful location of settlements.

²³⁷ SHAMGAR, *supra* note 219, at 409-10.

²³⁸ *Id.* at 414

²³⁹ *Id.* at 406-14.

²⁴⁰ Justice Landau, after stating the facts, then asked: “Have the *respondents* [i.e., the Israeli authorities] *shown* sufficient legal warrant for seizing the petitioners’ lands?” *Id.* at 420. (emphasis added).

²⁴¹ “... We must ask ourselves who bears the burden of proof? Must the petitioners convince us that the land was not requisitioned for the needs of the Army and security or should we perhaps require the respondents, the security authorities, to convince us that the requisition was needed for this purpose? I think that the burden rests upon the respondents.” *Id.* at 433.

²⁴² *Id.* at 422.

affidavit to the court, the primacy of politics over military judgment in making this decision undermined that justification. Hence, not only the government's broadly stated "national security" rationale, but also the narrower "regional defence" grounds proffered by the Chief of General Staff could not justify the requisition of private property in *Elon Moreh*. In Justice Landau's words,

In our legal system, the right of private property is an important legal value protected by both civil and criminal law, and as regards the right of an owner of land to legal protection of his property, it is immaterial whether the land is cultivated or barren.

The principle of protecting private property applies also in the law of war ...

To Julius Stone, the decision was remarkable in that "[p]robing of this severity by civilian judges of the motives of this level of military and political decision-makers of their own government is ... rather unique even in democratic policies."²⁴³ Its precedent in the general law of "belligerent occupation" "now offers the novel rider that 'military needs', even if attested in good faith by the highest military authorities, will not qualify as such if it appears that historically the subjective motive of the officials initiating the requisitioning procedure was not predominantly military."²⁴⁴

Even more important than the court's show of independence, its rhetoric and the particular result regarding the initial location of the *Elon Moreh* settlement, was the long term consequence of the decision.²⁴⁵ Thereafter, all Israeli settlements legally²⁴⁶ authorized by the Israeli Military

²⁴³ Julius Stone, *Aspects of the Beit-El and Eilon Moreh Cases*, 15 ISR. L. REV. 476, 490 (1980). Stone even questioned whether it made sense to allow the testimony of individuals to surmount the testimony of military officers that military necessity existed. *Id.* at 492.

²⁴⁴ *Id.* at 490.

²⁴⁵ Benvenisti & Zamir, *supra* note 34.

²⁴⁶ At times settlers have established settlements without authority of the Military Government, usually in the form of mobile homes on empty hilltops. In response to such, the Prime Minister appointed a commission, chaired by Talya Sason, to determine the extent of and make recommendations concerning illegal outposts. As a consequence of the resultant Sason Report, *supra* note 2, such settlements were supposed to be immediately dismantled. It appears, however, that the great bulk were still in existence as of December, 2005. See Dan Izenberg & Tovah Lazaroff, *No Action Taken on Illegal Outposts*, Dec. 7, 2005, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1132475697589&pagename=JPost%2FJPArticle%2FShowFull>. According to the Sason Report, four conditions must be satisfied to have settlement that is considered legal under Israeli law:

"First, the decision to establish a settlement must be made by the authoritative political echelon.Second,... Israeli settlements shall be established only on State land....Third[,]...a settlement shall be

Administration have been constructed on lands that Israel characterizes as state-owned or “public” land.²⁴⁷ This term would seem to include uncultivated rural land not registered in the name of anyone²⁴⁸ and land owned by absentee owners,²⁴⁹ both categories that existed under pre-existing legal regimes, including Jordanian and Ottoman law. Inversely, the term would seem to exclude land registered in the name of someone other than an absentee owner (regardless of whether the land is presently being cultivated), land as to which a title deed exists (even if not registered),²⁵⁰ and land held by prescriptive use.²⁵¹ The latter requires continuous use of the land for a period of ten years.

As might be expected, Israel’s categorization and characterization of certain lands as “state” or “public” have provoked considerable

established only according to a lawful designed building scheme.Fourth[,] the bounds of jurisdiction of such a settlement was determined in an order by the Commander of the area....” Because of these conditions for legality, the Sason Report defines an illegal settlement as one having one of the following characteristics: a) there was no government decision to establish it; 2) the outpost was established with no legal planning status; c) the outpost is not attached to an existing settlement; and/or 4) it was established from the mid-nineties on.

²⁴⁷ The term, as used by Israel since the Elon Moreh decision in the late 1970’s, seems to include lands owned by absentee owners and uncultivated rural land not registered to anyone. See Benvenisti & Zamir, *supra* note 34, at 307-314 and 315 (f.n. 106). The absentee owner category would seem to include land on the West Bank under registered ownership to Jews prior to 1948 that was held by Jordanian governmental authorities prior to 1967, but, in any event, the land most in dispute involves uncultivated rural land that was not under registered ownership to anyone. Even if this characterization is a continuation of the Jordanian characterization and law on the subject, this is not to say that Palestinians accept the notion that uncultivated land that is not registered qualifies as “state land.” See RAJA SHEHADEH, OCCUPIER’S LAW 26-33 (rev. ed. 1988). In addition, there have been recent reports of certain fraudulent land sales from Arabs to Jews, who then turn the land over to the Civil Administration operating under the military governor as “state lands”, with the lands then being leased back to the donors for development. See Akiva Eldar, *There’s a System for Turning Palestinian Property into Israel’s State Land*, HAARETZ, <http://www.haaretz.com/hasen/pages/662729.html> (updated Dec. 27, 2005).

²⁴⁸ KRETZMER, *supra* note 204, at 90. Although Ottoman law required registration for ownership, it is claimed that most land on the West Bank was never so registered in order “to preserve the collective ownership system (*musha’a*)[, ...to evade tax liability, and ...to avoid being drafted into the Turkish army.” During the British Mandate period and subsequent Jordanian rule, the pace of registration picked up, “[b]y the time that Israel occupied the West Bank, regulation proceedings had been completed for approximately one-third of the area.” Lein, *supra* note 29, at 54.

²⁴⁹ The designation of land as “public” because owned by absentee owners was a continuation of the Jordanian designation. Some of this land was owned by Jews or the Jewish Agency prior to 1948. See Benvenisti & Zamir, *supra* note 34, at 310-14.

²⁵⁰ Both of these types of land ownership would presumably come under the designation of *mulk* land. Lein, *supra* note 29, at 51

²⁵¹ KRETZMER, *supra* note 204, at 90. According to B’Tselem, “Miri lands are those situated close to places of settlement and suitable for agricultural use. A person may secure ownership of such land by holding and working the land for ten consecutive years. If a landowners of this type fails completely to farm the land for three consecutive years for reasons other than those recognized by the law..., the land is then known as *makhul*. In such a circumstance, the sovereign may take possession of the land or transfer the rights therein to another person.” Lein, *supra* note 29, at 52.

controversy.²⁵² Several of the most detailed critiques have been undertaken by *B'Tselem*, the Israeli human rights group, which concedes that 90 percent of the settlements have been established on what is nominally “state” land,²⁵³ but takes issue with that designation on both substantive and procedural grounds.

B'Tselem's principal substantive objections relate to the percentage of West Bank land that has been designated as “state” land and to the categories of land so categorized. According to *B'Tselem*, approximately 40 percent of West Bank land²⁵⁴ has been declared to be “state” or “public” lands, a vast expansion of the 16 percent of West Bank land considered state or public land while under Jordanian control. Other settlement opponents have used percentages in the range of 60 percent,²⁵⁵ although even *B'Tselem*'s figure may be on the high side when account is taken of its inclusion of certain Jerusalem neighborhoods in its calculations. However, *B'Tselem*'s concedes that the vast majority of this land is in the Jordan Valley, which, with the primary exception of Jericho, was barely populated by Palestinian Arabs prior to 1967 (a fact that would explain why such land was both unregistered and uncultivated).²⁵⁶ Moreover, regardless of the gross percentage of land designated as state or public land, according to *B'Tselem*'s own statistics, only approximately 5 percent of the West Bank land is within settlement “municipal boundaries” and a much, much smaller percentage of land, 1.7 percent of the West Bank, is developed settlement land.²⁵⁷ In other words, *B'Tselem*'s emphasis on the large percentage of land considered state or public on the West Bank relates more to the potential takeover of West Bank land by Jewish settlements rather than to the present

²⁵² See, e.g., Raja Shehadeh, *Jewish Settlements in the Occupied West Bank – How the Land was Acquired for their Use and how they are Structured*, 6-30 in Unispal, Division for Palestinian Rights, QUESTION OF PALESTINE: LEGAL ASPECTS (*Document 4*) (United Nations Mar. 31, 1992) at 7-11 <http://domino.un.org/unispal.nsf/eed216406b50bf6485256ce10072f637/ec6dd0bff00344e18525611e006d808d!OpenDocument> (last viewed Feb. 12, 2006); Stacey Howlette, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 VAND. J. TRANSNAT'L L. 117, 143-46 (2001); Lein, *supra* note 29 at 51-9; D. Kretzmer, *supra* note 204 at 90-4.

²⁵³ Lein, *supra* note 29, at 51.

²⁵⁴ Lein, *supra* note 29, at 8.

²⁵⁵ See, e.g., Deorah Horan, *The Promised Land Grab-Israel's West Bank*, THE WASHINGTON MONTHLY, May, 1993, available at http://www.findarticles.com/p/articles/mi_m1316/is_n5_v25/ai_13786320.

²⁵⁶ *B'Tselem* acknowledges that “there are no permanent Palestinian communities in the Judean Desert and Dea Sea areas” (Lein, *supra* note 29, at 93), that “a significant proportion of land in this area was already registered as state land under the jordanian administration, ...[and that] most of the land reserves held by Israel in the West Bank and registered in the name of the Custodian for Government and Abandoned Property is situated in this strip...” *Id.* at 93-4.

²⁵⁷ Lein, *supra* note 29, at 116.

reality of the actual land occupied. As *B'Tselem* itself concedes, there is a huge divergence between built-up areas and municipal boundaries.²⁵⁸

Of greater substantive merit is *B'Tselem*'s claim that, while in percentage terms the amount of public lands involved may not be large, West Bank areas designated as public lands along the central mountain range between the Jordan River and the Mediterranean Sea, and to the immediate east or west of the range, where many settlements were established, lie close to populated Palestinian centers and choke off their expansion and the use of the land for agricultural purposes. But analysis of particular settlements, including Ariel, one of the West Bank's largest, seems to focus more upon the stultifying effect of Ariel's presence if expansion continues to its full municipal boundaries than the comparatively small present built-up area.²⁵⁹ In other words, the notion of expansive municipal boundaries only has great relevance if continued Israeli sovereignty rather than Palestinian sovereignty is assumed.

B'Tselem also takes issue with the categories of land designated as "state" or "public" lands. To lands that were considered "state" lands by the Jordanians, according to *B'Tselem*, the Israeli military administration added land owned by the Jordanian government -- as property belonging to an enemy state -- and three categories of untitled land:²⁶⁰ "*Miri* land"²⁶¹ that was not farmed for at least three consecutive years, and thus became *makhul*; *Miri* land that had been farmed for less than ten years (the period of limitation), so that the farmer had not yet secured ownership; [and] land defined as *mawat*²⁶² due to its distance from the nearest village."²⁶³ Clearly it would be unfair to declare *Miri* lands that have been continuously farmed,

²⁵⁸ See, e.g., the discussion of several settlements south of the Trans-Samaria highway. One group of settlements is described as having municipal boundaries of 14 times the built-up area and another group as having municipal boundaries equal to 7 times the built-up area. Lein, *supra* note 29, at 101.

²⁵⁹ *B'Tselem* states that only 22 percent of the municipal area has either been built up or is in the process of construction. Lein, *supra* note 29, at 119.

²⁶⁰ That is, land the ownership to which is claimed on the basis of prescriptive use.

²⁶¹ Footnote added to text. "*Miri* lands are those situated close to places of settlement and suitable for agricultural use. A person may secure ownership of such land by holding and working the land for ten consecutive years. If a landowner of this type fails completely to farm the land for three consecutive years for reasons other than those recognized by the law (e.g., the landowner is drafted into the army, or the land lays fallow for agricultural reasons), the land is then known as *makhul*. In such a circumstance, the sovereign may take possession of the land or transfer the rights therein to another person. The rationale behind this provision in the Land Law was to create an incentive ensuring that as much land as possible was farmed, yielding agricultural produce which could then be taxed." Lein, *supra* note 29, at 52.

²⁶² Footnote added to text. "*Mawat* ('dead') land is land that is half an hour walking distance from a place of settlement, or land where 'the loudest noise made by a person in the closest place of settlement will not be heard.' According to the legal definition, this land should be empty and not used by any person. In this case, the sovereign is responsible for ensuring that no unlawful activities take place in such areas." Lein, *supra* note 29, at 52.

²⁶³ Lein, *supra* note 29, at 53.

but not yet for the full ten years, as state land. Yet it is unclear from *B'Tselem*'s presentation how much of the "state" land consists of *Miri* lands that fall into this subcategory and which, if any, Jewish settlements were actually established on that land.²⁶⁴

B'Tselem's procedural objections to the notion of state or public land on which all settlements have been established since 1979 *are* deserving of serious attention.²⁶⁵ *B'Tselem* claims that, because most land was not registered under the Ottoman Empire for reasons such as tax avoidance, it was held according to prescriptive use. Yet, according to *B'Tselem*, parties who might have been affected by the designation of land as public land were frequently not directly notified of such designation. While village *mukhtars*, actually appointed by the military government, were notified, the *mukhtars* in turn failed to notify the affected land "owners", who first discovered the designation when settlement building had begun.²⁶⁶ Theoretically, an appeals process existed, but the land claimants often learned of the designation of their property as state land too late to appeal the designation. Moreover, regardless of when the affected Palestinians heard about the designation, their only source of contesting the designation was a Board of Appeals established by the military administration, which granted relief in only a small percentage of cases. The burden of proof lay on the petitioners. And that proof was difficult, given that the Israeli authorities took periodic aerial photographs as to whether the land was in fact being used for farming.²⁶⁷ With respect to West Bank property that was registered but owned by someone mistakenly classified as an absentee owner, *B'Tselem* asserts a similar failure in the notice process. It cites one instance in which the appeals committee refused to undo the transaction that allowed for a settlement to be built on the ground that the faulty conclusion that the land had been abandoned was made in "good faith."²⁶⁸ In addition, *B'Tselem* claims, the presence of the military court of appeals actually precluded, in

²⁶⁴ David Kretzmer, who is critical of Israeli governmental policy concerning settlements (as part of a larger criticism of Israeli actions on the West Bank), likewise argues that since only about a third of the land on the West Bank was registered prior to 1967, unregistered lands are not necessarily state lands. However, he also cites the fact that a government attorney, in charge of checking whether land could be characterized as "state land", estimated that approximately 40 percent of the West Bank land could be so characterized. Thus the Israeli definition of private lands must include substantial areas where ownership has been accepted or proved on the basis of "prescriptive use." At least some of Kretzmer's criticism, then, really comes down to the means by which Palestinians must prove "prescriptive use" and the appeals committee before whom such proof has to be made. See KRETZMER, *supra* note 204, at 90-1.

²⁶⁵ Kretzmer echoes the procedural objections at pp.91-94. See KRETZMER, *supra* note 204, at 91-94.

²⁶⁶ Lein, *supra* note 29, at 55

²⁶⁷ *Id.* at 56.

²⁶⁸ *Id.* at 59.

most instances, the Palestinians appealing to the Israeli Supreme Court because, in theory, another procedural recourse existed.

These are, of course, allegations. *B'Tselem* seems to say that the military administration, by using aerial photographs, had an unfair advantage over those contesting land ownership, but it is unclear why use of technology should prejudice the purported landowner. *B'Tselem* also concedes that many prospective claimants had discontinued use of unregistered land because of high wages in the Israeli labor market, which made working in that market more favorable than continuing to farm.²⁶⁹ This argument, in any event, would seem to relate more to the political and economic relationship between any prospective Palestinian state and Israel than to the genuineness of an ownership claim based upon prescriptive use. It is difficult to jump to the conclusion that a settlement falls on private land, claimed on the basis of alleged use which was discontinued by choice on the part of the purported owner.²⁷⁰

Nonetheless, *B'Tselem's* core accusation that many land claimants were denied notice and/or failed to contest the designation of land because of the biased, or perceived to be biased, nature of the tribunal remains a serious allegation. Even if recourse was never sought from the Board of Appeals, landowners should still have the opportunity to prove their claims. If such a claim is established, two resolutions are possible, consistent with the theme of this Article. Where substantial construction on land has not yet occurred (that is, the land is in effect “reserved” for a particular settlement), the condition that no private Arab land has been taken for the settlement will not have been established, and the particular land should revert to its Palestinian owner, with damages for the period in which the Palestinian owner was unable to use the land. If there is substantial settlement construction on that land with conflicting claims of settlers who relied upon the characterization of the land as “state” land, rightful Palestinian claimants should be granted restitutionary relief that would include a monetary amount representing lease payments equal to what they would have received had the land been requisitioned rather than mistakenly designated as “state” land, with appropriate interest thereon from the date those lease payments would have been made, as well as damages equal to the present value of the property (rather than the value as of the date of the false designation).

²⁶⁹ *Id.* at 56-7.

²⁷⁰ Significantly, as Von Glahn points out, “the Hague Regulations do not define state property or supply a test of state ownership”, adding that the “[g]eneral practice among modern occupants indicates that if doubt exists concerning the nature of the ownership of property, it is held to be publicly owned until and unless private ownership is established.” VON GLAHN, *supra* note 203, at 179.

Settlements falling into two other categories would, as well, not meet the condition that a settlement must not have been established on Palestinian owned land. Certain outposts, mostly hilltop caravans, have been set up without the approval of the Israeli government; some of these were later abandoned and then reoccupied. These settlements are considered illegal under Israeli law. Several years ago, the Israeli government appointed Talya Sason, an attorney, to investigate this phenomenon. Her investigation revealed at least 105 of these illegal outposts. Of these, to the extent that Sason was able to establish the legal status of the land on which the outposts sit, 26 are located on state land, 7 are located on survey land, and 15 located on Palestinian private property. Thirty-nine are located on “mixed” lands, that is, land that is part state, part survey, and part owned by Palestinians.²⁷¹ These outposts, almost all of which were established in the 1990’s, are supposed to be dismantled, although only several have been thus far.²⁷² A majority of these outposts fail the condition that a settlement not be established on Palestinian private property and hence should not continue in a future Palestinian state.²⁷³

Another group of settlements that may not satisfy this condition are settlements that allegedly have been constructed on land acquired fraudulently.²⁷⁴ One recent allegation by *B’Tselem*,²⁷⁵ for instance, relates to

²⁷¹ Sason Report, *supra* note 2. “Survey land” seems to refer to land that has gone through a survey land procedure for the settlement. In some cases, these procedures were accomplished without regard to whether the settlements were otherwise legally established. *Id.*, at 14.

²⁷² See, e.g., Nadav Shragai, Yuval Yoaz and Akiva Eldar, *Four Officers, 11 Settlers Injured as Illegal W. Bank Outpost Razed*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/669054.html> (last updated Jan. 11, 2006) (dismantling of Neveh Daniel North outpost, and impending difficulty of dismantling Amona outpost); Aluf Benn, Amos Harel and Yuval Yoaz, *Settler Leaders: Olmert’s Plan for Outposts is ‘Declaration of War’*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/671976.html> (last updated Jan. 18, 2006) (describing Acting Prime Minister Ehud Olmert’s call for the defense establishment to formulate a plan to evacuate twenty illegal outposts, and the negative reaction of settler leaders to that call).

²⁷³ Amir Peretz, chair of the Labor Party, has announced that the condition for joining a coalition government is the dismantling of all illegal settlements. See Lilach Weissman, *Labor will Only Join Gov’t that Pledges to Quit all 105 Illegal West Bank Outposts*, HAARETZ, <http://www.haaretz.com/hasen/spages/691823.html> (last updated Mar. 8, 2006). On the other hand, there has been some suggestion that a Kadima led government might *ex post* authorize some of the settlements (that is, “legalize” them under Israeli law) provided “that they were built on state land and not private Arab property, ... fall within ... [an existing legal settlement’s] master plan and are in areas which Israel intends to keep” in any final settlement or unilateral border decisions. Herb Keinin & Yaakov Katz, *Exclusive: Gov’t may OK illegal outposts*, JERUS. POST ONLINE, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1139395644062> (Mar. 21, 2006).

²⁷⁴ Lein, *supra* note 29, at 63. Allegedly, one reason for the lack of visibility is the fact that, because a sale of land to Israeli Jews is considered an act of treason punishable by death, the Israeli military authority issued an order extending the period of an irrevocable power of attorney from the five years provided by Jordanian law to fifteen years, an extension that sought to hide the identity of Palestinian sellers. *Id.*

new construction in the *Modi'in Illit* settlement on land within the territory of the Palestinian village of *Bil'in*. Supposedly, a Palestinian father sold land to his son who in turn sold the land to the Society of the Foundation. The latter then transferred that land in trust to the Israeli administration, which, after converting the land to state land, leased the land back to the settlers' building concern.²⁷⁶ Both the Palestinian father and son are dead,²⁷⁷ and the claim is that their signatures as well as those of others were forged in this chain of events. If this is proved, any such settlement would not have satisfied the condition of not having been built on Arab owned land. The facts of the case remain murky, including whether the land at issue belonged to the individual Palestinian-sellers or to the village within whose borders the land was situated. A justice of the Israeli Supreme Court has issued a temporary injunction in this case, and the Israeli State Prosecution is considering a criminal prosecution.²⁷⁸

With these exceptions, however – no matter the procedural flaws that require redress – the important point is that the vast majority of settlements have not been legally established on land deeded or registered to resident Palestinian Arabs or on land to which they can lay claim by cultivated use over a period of time. Critics rightly note that Arab individually owned land has been used for public improvements such as roads.²⁷⁹ As long as Israel is

²⁷⁵ See Akiva Eldar, *Documents Reveal West Bank Settlement Built Illegally*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/665425.html> (updated Jan. 3, 2006). Eldar's piece, which alleges that the Modi'in Illit settlement "is being built on land belonging to the Palestinian village of Bil'in", is based in large part upon the research and allegations of B'Tselem. Eldar, like B'Tselem, as is a vociferous opponent of Israeli settlements and whether the allegations turn out to be accurate remains to be proved. Unclear in Eldar's piece is whether this was land allegedly owned by private individuals within the village or by the village itself.

²⁷⁶ *Id.*

²⁷⁷ The son was apparently shot in Ramallah in 2005. Since the Palestinian Authority considers it a capital offense to sell land to Jews, an alternative explanation might be that the sale was in fact legitimate but other Palestinian residents of the village are simply now alleging otherwise.

²⁷⁸ See Akiva Eldar, *State Mulls Criminal Probe into Illegal Settlement Construction*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/667303.html> (last updated Jan. 7, 2006).

²⁷⁹ See, e.g., H CJ 393/82 Askan v. Military Commander, [1983] IsrSC 37(4) 785, translated in Zamir & Zysblat, *supra* note 223, at 396-409. The petitioners, who constituted a cooperative society, had purchased land for the purpose of a housing project. When they applied for a housing permit, the permit was denied and part of the land was requisitioned to construct two highways, linking two different towns in the West Bank and also linking those towns to Israel. In that case, Justice Barak spoke about the twin themes of the Hague regulations, the interests of the military occupant (in this case, Israel) and the interests of the needs of the civilian population (in this case, the Palestinians). Since one of the duties of a military commander is to secure the continued existence of civilian order and life under §43 of the Regulations and since, especially in a long occupation not envisioned in the Hague Regulations, circumstances do not stand still, the Military Commander was held to be able to take account of changed circumstances in pursuing public investments, as long as a prime reason was the good of the civilian population. In Justice Barak's words, "Fundamental investments which might lead to permanent change that persists after termination of the military government are permitted if they are reasonably required for the needs of the local population." *Id.* at 494.

the ultimate power in the West Bank, especially over a 40-year period, it cannot simply neglect infrastructure improvements that other governments routinely effect, even if private property must be taken with compensation, or requisitioned with periodic use payments, for such purpose. Every nation in the world, including the United States²⁸⁰, takes land for such purposes. Until a final peace settlement is achieved, road construction and other public infrastructure improvements are theoretically both inevitable and warranted. The heart of the criticism, however, is that most of the road work seems to have primarily benefited the Israeli military and/or settlers rather than the Arab residents and therefore cannot be justified on the need to ensure the civil life and order of the local populace in accord with Article 43 of the Hague Regulations.²⁸¹ On the other hand, the extent of terrorist attacks on the Israeli military and Jewish residents while traveling would tend to legitimate takings necessary for infrastructure work on a theory of “military necessity.”²⁸² Moreover, while there is dispute as to whether these roads presently benefit the Israeli military and citizens more than West Bank Palestinians, in any peace settlement the roads would serve all residents and substantially contribute to the economic well-being of a new Palestinian state.

(b) Land owned by Arab communities or villages

²⁸⁰ See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), where in a 5-4 decision the Supreme Court validated New London’s expropriation of the property of homeowners not even to construct a highway or public facility, but to facilitate construction on the land by a private developer. The majority of Stevens (writing for the court), Kennedy, Souter, Ginsburg and Breyer, included those considered most liberal on the court. One prominent Supreme Court academic observer, Professor Erwin Chemerinsky of Duke Law School, disputed the notion that this decision was a “dramatic change in the law”: “in reality the Court applied exactly the principle that was articulated decades ago: a taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public.” Practicing Law Institute, All Star Briefing, *Erwin Chemerinsky: The Supreme Court’s Decision in Kelo is not so Radical as Many have Made it Out to Be*, Dec. 8, 2005, <http://media.whatcounts.com/pli/allstar/ASB3.45.htm>.

²⁸¹ Kretzmer argues that the party making the decision, the military government or a panel appointment by such, can hardly have the interests of the local populace solely in mind. In fact, he postulates that “[t]he notion of ‘public benefit’ [the theory under which such improvements have been sustained by the Supreme Court] is intimately connected to political objectives and interests.” KRETZMER, *supra* note 204, at 69-70. He particularly takes aim at the Israeli decision to disband district planning bodies that provided input into the central planning process under Jordanian law. District councils may have made sense under the law of Jordan, which, in many ways, disregarded the economic development of the West Bank in favor of Jordan’s East Bank (Transjordan), but retard central planning in an administrative structure trying to modernize society. Nonetheless, Kretzmer rightly points out that there should be local input into the process, although not necessarily a veto, and that the main consideration under the Hague Regulations should be the welfare of the population in the occupied territory rather than the political needs of the State of Israel where the two conflict. In an occupation that has lasted this long, query, however, whether the local populace should not also include the West Bank’s Jewish residents, unless there are other grounds that make their presence on the West Bank illegal.

²⁸² See *Askan v. Military Commander*, *supra* note 279.

B'Tselem has also made a wider claim, to wit, that Israel has expropriated land belonging to Arab villages, without compensation, in order to construct Jewish settlements. For example, *B'Tselem* vigorously argues that *Ma'aleh Admumim*, the largest Israeli settlement on the West Bank and one several kilometers to the east of Jerusalem, is situated on territory taken from *Abu Dis*, *al-'Izriyyeh*, *al-'Issawiyyeh*, *a-Tur*, and *'Anata*, Palestinian Arab villages on the outskirts of Jerusalem.²⁸³ But its “brief” to that effect then equivocates: “The farmland of these villages extended from the border of Jerusalem on the west to *a'-Khan al-Ahmad*, at the approach to the Dead Sea, on the east. Ownership determined land usage, i.e., each family worked the land that it owned.”²⁸⁴ Thus, it is unclear whether *B'Tselem* is making the claim that the land is owned by private individuals within the identified villages or is village land owned collectively by its residents. If it is the former, *B'Tselem's* argument collapses into the argument, already discussed, that Israeli settlements have been placed on land privately owned by Palestinians. If, instead, *B'Tselem's* claim is that it is village land, the source of this claim needs to be examined.

Since the five villages identified do not have any registered title to this expanse of land, *B'Tselem* tries to argue on the basis of prescriptive use. But, while some claim is made that the villagers themselves had used the land for grazing, the use demonstrated was by *Jahalin Bedhouin*, who in recent years intermittently camped and grazed their livestock on land to the east of Jerusalem going down to the Dead Sea. But *B'Tselem* strains to find a connection between *Jahalin Bedhouin* and the Palestinian villagers whose claim to the land *B'Tselem* champions: “They grazed on village land in accordance with lease agreements (at times symbolic) with the landowners – including landowners from the villages of *Abu Dis* and *al'Izariyyeh*.”²⁸⁵

In other words, only Palestinian Arab villages may be constructed and expanded on land because *Bedhouin* have occasionally grazed their flocks thereon pursuant to the implied consent of Palestinian villagers whose right to the land (that is, the right to consent to someone else using it) is based upon the same *Bedhouin* use. Aside from its circularity, *B'Tselem's* argument equates whatever rights *Bedhouin* may or may not have with the rights of sedentary Arab villages on the outskirts of Jerusalem. Are the

²⁸³ See Yuval Ginbar, *On the Way to Annexation: Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Admumim Settlement* at 3 (*B'Tselem* July 1999), http://www.btselem.org/Download/199907_On_The_way_Annexation_Eng.doc (last visited Jan. 10, 2006).

²⁸⁴ *Id.* at 4.

²⁸⁵ *Id.* at 22.

rights identical? Why?²⁸⁶ Interestingly, *Bedhouin* do not necessarily identify themselves as Palestinian Arabs, and, although they are surely not Israeli Jews, many *Bedhouin* are Israeli citizens, serve (unlike most Palestinian Arabs who are Israeli citizens) in the Israeli army, and disproportionately have been killed by Palestinian attacks on Israeli border patrols.

Moreover, when the expansive reach of *B'Tselem*'s claim on behalf of the villages (all land substantially down to the Dead Sea to the east of Jerusalem) is considered, presumably the question of which of the five villages has the rights to this expansive stretch of land becomes pertinent. Are the rights of each of these villages identical? Would not the claim of some of the villages conflict with the claims of others? *B'Tselem*'s brief neither asks nor tries to answer these questions. The result is that, sometimes explicitly and otherwise implicitly, its claim that the land belongs to these villages collapses into the contention – dealt with in the next subsection -- that only Arabs, not Jews, have the right to own and use this land.

(c) Land owned by a larger Arab polity of “people”

The meaning of the argument (by some) or the assumption (by others) that Israeli Jewish settlements have been established on “Arab” land in a broader sense is quite obscure. Let us put aside for the moment the whole argument about whether Israel's only status on the West Bank is that of an “occupying power”, with any international legal implications of that characterization.²⁸⁷ If the resultant conclusion from the argument/assumption is that Jews cannot legally establish settlements west of the Jordan River and east of the Green Line, is the essence of this claim based upon the negative notion that Jews have no rights or the positive notion that the land legally belongs to “Palestinian” Arabs?²⁸⁸

As related previously, that Jews have only limited privileges in the Near East is a recurrent historical theme. This perspective denies substantially all aspects of the Jewish narrative, including a millennia-old

²⁸⁶ Interestingly, the problem of designating and dividing land on the basis of *Bedhouin* use is not unique to the West Bank situation; Jordan has struggled with the same issue east of the Jordan River. See M.F. Tarawneh, *Public Land Between the State and the Tribes: A Dilemma of Rural Development: A Case from Souther Jordan*, CIHEAM – Options Méditerranéennes, Serie A: Séminaires méditerranéens, available at ressources.ciheam.org/om/pdf/a38/99600176.pdf. (last viewed Mar. 7, 2006).

²⁸⁷ See *infra* notes 168-179, and accompanying text.

²⁸⁸ Eugene Rostow described this diffuse feeling as follows, “The legal assumption ... is that the territories in dispute as in some sense “Arab” territories held by Israel only as military occupant.” Rostow, *Self Determination*, *supra* note 174, at 152.

nexus with the land. More recently, within the 20th century, after promising the land in the Palestinian mandate for a Jewish homeland²⁸⁹, the British decided to partition off approximately 70 percent of Mandatory Palestine to provide a kingdom for the Hashemites.²⁹⁰ Transjordan, once created, barred Jews from owning land or even living within its borders, a prohibition it extended to the West Bank when it captured it in 1948.²⁹¹

If the basis of the argument is that, in a positive sense, the West Bank “belongs” to Palestinian Arabs, what is the basis for this claim – legal title, longevity of habitation, the concept of peoplehood, or other? Although these issues have been adequately discussed and in some cases debated elsewhere, at least brief mention of why the notion that the West Bank is only “Arab” land cannot justify the claim that Israeli Jewish settlements are illegal is warranted. Prior to the first Zionist aliyah in the late 19th century, most of the privately owned land west of the Jordan was either “state-owned” land or land privately held by absentee Turkish landlords. With respect to the privately owned land, most of the purchases were by the Jewish Agency and allowed Jewish settlements to exist, and virtually all of this land was not even land that was then farmed by Arabs in that area. As for state ownership, any title claims descended from the Ottoman Empire (that is, Turkish state ownership) to British trusteeship to Jordanian annexation that was never recognized internationally. Moreover, it has been estimated that over thirty square kilometers of land on the West Bank were owned by Israeli Jews prior to any requisitions for settlements.²⁹² In short, whatever

²⁸⁹ The promise was made in what is commonly known as the Balfour Declaration, issued on November 2, 1917: “His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the right and political status enjoyed by Jews in any other country.” J.N. MOORE, ED., 3 THE ARAB-ISRAELI CONFLICT 31, 32 (1974). The Balfour Declaration was binding on Britain, and when Britain was assigned the Mandate for Palestine after the collapse of the Ottoman Empire, the Balfour declaration became binding on the League of Nations as an international agreement between Britain and the League. See Dinstein, *supra* note 179, at 137-54. Dinstein states: “It follows that virtually the whole international community, as it existed in the era between the two World Wars, was legally committed to the Mandate for Palestine, which included the obligation for the establishment in Palestine of national home for the Jewish people. Admittedly, the Balfour Declaration and the Mandate for Palestine did not ignore the rights of non-Jews in Palestine. Nevertheless, whereas Jews were granted the right to establish a national home, non-Jews were conceded only civil and religious rights. In other words, the expectation was that non-Jews would live as a protected minority within the Jewish national home.” *Id.* at 140.

²⁹⁰ Peel Report, *supra* note 86, at 37 & 60-1.

²⁹¹ Benvinisti & Zamir, *supra* note 34, at 315. For Jordanian restrictions on selling land to Jews, see Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. COMP. L. 39, 47-48 (1980).

²⁹² Benvinisti & Zamir, *supra* note 34. Benvinisti and Zamir further report: “Some of the Jewish-owned lands in these areas were not inhabited, but most were. Some of the inhabitants had been forced to leave their property during the turbulence of the 1920s and 1930s, and most of them (several thousand, mainly from the Jewish quarter of Jerusalem and the Gush Etzion settlements south of Jerusalem) were displaced in

claims exist with respect to West Bank land on the part of Palestinian Arabs, the claim is not based upon any concept of a recorded legal title.

Certainly, much of the popular belief in the claim that the West Bank belongs to Palestinian Arabs rests upon a notion of longevity – the Arabs were there *first*. But what does “first” mean? One possible meaning of “firstness” is “most ancient.” As mentioned previously, Arabs recently have tried to buttress the “firstness” of their claim by asserting that they are descended from the ancient Canaanites²⁹³, but there is no anthropological or other evidence that supports this claim.²⁹⁴ The solely political nature of the claim is transparent.²⁹⁵ If, then, “first” means the ties to the land that are most ancient, the three millennia history of the Jews in that area²⁹⁶ – a history increasingly supported by mounting archaeological evidence²⁹⁷ – would seem to give Jews the superior claim.

Popular support for the argument that the Palestinian Arabs were there first, it would seem, depends far less upon an ancient notion that the Palestinians were the first inhabitants of the land several millennia ago, than the notion that in more recent times they were the majority, indeed almost exclusive, inhabitants of the land prior to the advent of modern Zionism. Edward Said²⁹⁸ and Noam Chomsky, among others, popularized this view, according to which the Zionists were colonizers over an indigenous Palestinian population. But even that argument raises more questions than it supplies answers. What land is included in the claim of majoritarianism or exclusivity? For example, Jews apparently constituted a plurality of the

the 1948 war. Yet, unlike the Palestinian refugees, these Jewish refugees were rehabilitated and the resettled with the help of the Israeli authorities, which prevented the creation of a permanent problem.” *Id.*, f.n.15 at 298.

²⁹³ See, e.g., SALMAN ABU SITTA, *ATLAS OF PALESTINE 1948: RECONSTRUCTING PALESTINE* (2005); Itamar Marcus and Barbara Crook, *PA hate TV Reaches New Levels*, Dec. 29, 2005, <http://www.pmw.org.il/Latest%20bulletins%20new.htm#b291205> (describing a program about Jaffa that “opens with a revision of history, by casting the ancient Canaanites as Arabs [and] [b]y doing this, the more than 3,000 years of Jewish history in the area are pre-dated by a fabricated Arab history.”)

²⁹⁴ As Ephraim Karsh reported, “in an attempt to prove the historic continuity of an ‘Arab nation’, the Palestinian intellectual and political leader Yusuf Haikal traced Arab imperial greatness to the ancient Fertile Crescent peoples such as the Hittites, Canaanites, Amorites, *et. al.*, ignoring the minor problem that these diverse peoples never constituted a single people, let alone an Arab one.” KARSH, *supra* note 36, at 7.

²⁹⁵ See Benny Morris, *Details and Lies*, THE NEW REPUBLIC ONLINE, <http://www.tnr.com/docprint.mhtml?i=20051031&s=morris103105> at 9 (reviewing Salman Abu Sitta, *supra* note 293).

²⁹⁶ See *supra*, notes 84-6, and accompanying text.

²⁹⁷ See, e.g., Itim, *Remains of Second Temple Era Jewish Village Discovered*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/664845.html> (updated Jan. 1, 2006).

²⁹⁸ For a taste of his writings on the subject, see SAID, *supra* note 4, at 266-77. Said, now deceased, was so adamant about the Palestinian cause that he rejected a two-state solution in favor of a bi-national state, which is generally recognized to be code for destruction of the State of Israel. See DERSHOWITZ, *ISRAEL*, *supra* note 14, at 5.

residents of Jerusalem, whose other inhabitants included Palestinian Arabs, Greeks, Europeans, Turks and others, at least at the turn of 19th century.²⁹⁹ Prior to Arab riots and massacres in early Twentieth Century, Jews had inhabited Hebron along with Arabs for centuries.³⁰⁰ While the exact numbers are uncertain, it appears that many Arabs that assert a “Palestinian” identity were attracted to the land west of the Jordan *because of* Jewish settlement and economic development that provided jobs.³⁰¹ The quality of some of the research on this subject has been subjected to enormous criticism – for example, on the theory that the 20th Century increase in the Arab population in Palestine may have resulted from better health care rather than the economic growth generated by Jewish settlement³⁰² -- but the two tendered explanations are not mutually exclusive. The fact that the Arab population in and around Jewish settlements increased several times the increase recorded in other areas of Palestine, as well as other evidence, lends support to the economic growth thesis.³⁰³ In short, both Jews and Arabs lived for centuries in a sparsely populated, desolate and largely neglected land; Arabs surely constituted the majority of the population prior to the 20th century, but Jews constituted a majority or plurality in Jerusalem and certain other places. Yet, Jews were excluded from most of Palestine once the British created Transjordan in order to provide the Hashemites a throne.³⁰⁴

Some of the notion that the West Bank belongs to Palestinian Arabs exclusively rests on the notion of Palestinian “peoplehood.” Indeed, an

²⁹⁹ MARTIN GILBERT, *JERUSALEM IN THE TWENTIETH CENTURY*, Introduction at ix (1996)(describing Jews as a majority of Jerusalem residents around the year 1900); DERSHOWITZ, ISRAEL, *supra* note 39, at 17(describing Jews as being a majority since the first population census began in the 18th century).

³⁰⁰ DERSHOWITZ, ISRAEL, *supra* note 39, at 17.

³⁰¹ The extensive literature on this subject is also summarized in DERSHOWITZ, ISRAEL, *supra* note 39, at 27-8 and the footnotes accompanying that text. The uniqueness of the United Nations definition of a Palestinian refugee is also instructive: unlike the definition applicable to any other group, having been in Palestine for only one year prior to exodus qualified the emigrant as a “refugee.”

³⁰² The work that has been subjected to most of this criticism is JOAN PETERS, *FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE* (1984). Ms.Peters, an English researcher, started looking at the Israeli-Arab dispute several decades ago from a Palestinian perspective, but then concluded almost ten years of research with a belief that many “Palestinians” came from elsewhere due to the improving economic conditions that accompanied Jewish settlement. While some of the criticism directed towards Peters’ work was politically motivated, the strongest critique was not. See Yehoshua Porath, *Mrs. Peters’s Palestine*, N.Y.REVIEW OF BOOKS, vol. 32, Jan. 16, 1986, at 36-40 (ascribing much of the growth of the Arab population not to immigration, but to better health provision).

³⁰³ See Letter from Ronald Sanders, *Mrs. Peters’s Palestine: An Exchange*, 32 N.Y. REV. OF BOOKS, Mar. 27, 1986, at 50; Dershowitz, ISRAEL, *supra* note 39 at 27-8. The uniqueness of the United Nations definition of a Palestinian refugee is also instructive: unlike the definition applicable to any other group, having been in Palestine for only one year prior to exodus qualified the emigrant as a “refugee.”

³⁰⁴ Originally, the Balfour Resolution, recognized by the League of Nations, called for a Jewish National home in all of Palestine, but at least two thirds of that possibility was eliminated by the League’s “assent to a British proposal to suspend application of Jewish national rights under the Palestine Mandate to the area of Trans-Jordan.” GERSON, *supra* note 160, at 44. See also Peel Report, *supra* note 86, at 37-38.

argument made in favor of the state of Israel has been applied to the Palestinians: the state of Israel is justified on the ground that a people (Jews), having a common culture and religion (Judaism, whatever its variety), with a distinct language (Hebrew), deserve like other peoples a geographical area distinct and governed by them. But the analogy breaks down on many fronts. First and foremost, if the argument is used to counter the right of Jews to settle as communities on the West Bank, one must initially note that there *are* communities of Arabs living within Israel.³⁰⁵ Equally significantly, the Palestinian Arabs do not have a tradition, religion, language or anything else that is materially distinct from the other countries in the Middle East, with the exception of Israel and the possible exception of Lebanon.³⁰⁶ Through much of the Twentieth Century, most Arabs, including most Arabs in Palestine, saw the Arabs in Palestine less as a separate people than as part of a greater polity of Arabs living within a greater Syria.³⁰⁷ There is even evidence that the whole notion of peoplehood was a construct to be used against the creation of a Jewish state rather than a firmly held reality prior to the creation of the modern state of Israel.³⁰⁸

However, all of these arguments are beside the point: whether or not Palestinians considered themselves a somewhat distinct people, they seem to do so now and the question of whether there should be an independent Palestinian state has been answered in the affirmative. The point here is not that there should not be a Palestinian state, but that state need not exclusively be inhabited by Palestinian Arabs. To the extent that such a

³⁰⁵ As stated elsewhere, the percentage is approximately 20 percent. See Z. Klein, *Israel's Population on Eve of New Year: 6.955m*, Oct. 2, 2005, www.globes.co.il.

³⁰⁶ The prominent Palestinian academic, Walid Khalidi, has even stated that the "Arab nation both is, and should be, one." Khalidi, *Thinking the Unthinkable*, FOREIGN AFFAIRS, 696, July 1978.

³⁰⁷ Peel Report, *supra* note 86. See a discussion of this in Curtis, *supra* note 110, at 471-2: "The myth that Jews in Palestine unjustly displaced 'the Palestinian people' may be widely espoused, but official documents before 1947 generally spoke of 'Arabs in Palestine,' not of a 'Palestinian people.' Though some Arab journalists and politicians spoke of a Palestinian national movement in the 1920's, the people in the area did not consider themselves a separate Palestinian people per se. Rather, they historically identified themselves with the larger Moslem or Arab world (Qawmiya) or with the Syrian nation. Only with the creation of Israel and the Arab exodus from the occupied territory did a Palestinian national consciousness develop."

³⁰⁸ While no one contests that there were Arabs in the Palestinian Mandate, the self-identity of those Arabs has been fiercely contested. For an example of the view that "Palestinian" identity was simply "a purely negative reaction to Zionism after the Balfour Declaration", see Marie Syrkin, *Palestinian Nationalism: Its Development and Goal*, in M. CURTIS, J. NEYER, C. WAXMAN, & A. POLLACK, THE PALESTINIANS, PEOPLE, HISTORY, POLITICS at 199-208 (1975). On the other side of the political spectrum, an extreme view of Palestinian identity based upon continuity from the ancient Philistines may be found in FRANK SAKRAN, PALESTINE, STILL A DILEMMA 104-05 (Washington, D.C.: American Council on the Middle East, 1976). A group of "new historians" in Israel, who generally are regarded as more favorable to the Palestinian than the Israeli viewpoint, have taken a more nuanced view of Palestinian identity as arising simultaneously with the Zionist movement. See, e.g., BARUCH KIMMERLING AND JOEL MIGDAL, THE PALESTINIAN PEOPLE, A HISTORY (2003).

claim depends upon a notion that the land belongs to an Arab polity, it did not in the past (note that the Ottoman Empire is not an Arab polity) and, most importantly, it would not destroy any “Peoplehood” of Palestinian Arabs by having Jewish communities in their midst.

Indeed, in the broadest sense, the notion that the West Bank “belongs” only to Palestinian Arabs because it is “Arab” land speaks not only to the issue of Jewish settlements, but to the question of Jewish settlement within the pre-1967 borders of Israel, that is, the legitimacy of Israel itself.³⁰⁹

3. The “transfer” issue: the charge that Israel, as an occupying power, has transferred its citizens into the West Bank in violation of Article 49 of the 4th Geneva Convention³¹⁰

As time passed, settlement opponents increasingly have relied less on the the Hague Regulations, with its underlying dominant theme of protecting an ousted sovereign, and more on the 4th Geneva Convention, with its transparently humanitarian ideals and provisions. The specific charge has been that the establishment of the settlements violated the sixth paragraph of Article 49,³¹¹ which states: “The occupying power shall not deport or transfer parts of its own civilian population into territories it occupies.”³¹² Frequently paragraph 6 is recited as its “plain meaning” were transparent and its application to the establishment of Israeli settlements beyond dispute.³¹³ However, as is the case with respect to the Hague Regulations, both the meaning of this provision and its applicability to Israeli settlements are subjects of substantial dispute. Many general texts on international

³⁰⁹ In an article primarily addressed to the question of the legality of Jewish settlements but also the question of whether a second Palestinian state should be established (the first being Jordan itself, which was carved out of and acquired the majority of the land covered by the Palestinian Mandate), Eugene Rostow recognized this fundamental reality: “They [the “Proponents of ‘Palestinian self-determination’] cannot bring themselves to believe that the object of the campaign for a third Palestinian state is not a peaceful solution of the Palestine problem, but the destruction of Israel.” Rostow, *Self Determination*, *supra* note 174, at 171.

³¹⁰ See *supra* note 152.

³¹¹ For the complete text of Article 49, see *supra* note 157. Final Record, *supra* note 152, Vol. I, at 307.

³¹² *Id.*

³¹³ See, e.g., letter from Sarah Leah Whitson, Executive Director, Middle East North Africa Division of Human Rights Watch, to President Bush, entitled, *Israel: Expanding Settlements in the Occupied Palestinian Territories*, December 26, 2005, available at http://hrw.org/english/docs/2005/12/27/isrlpa12346_txt.htm (last viewed Jan. 22, 2006); DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAND IN ARMED CONFLICTS 246 (1995) (“Article 49, para.6 prohibits ... the settlement of nationals of the occupying power in the occupied territory.”, with a footnote 33 concluding, “The settlement of civilians in the territories occupied by Israel therefore contravenes Article 49, para. 6.”).

humanitarian law give paragraph 6 scant if no attention,³¹⁴ and, if anything, its origins and meaning are more obscure than the provisions of the Hague Regulations discussed previously.

(a) The Rostow perspective, *redux*

An initial problem with the argument that Israeli settlements violate paragraph 6 of Article 49 is that this argument, once again, may presuppose a conclusion that the West Bank constitutes “occupied” rather than “disputed” territory in a legal sense. Eugene Rostow consistently took the position that the predicate for the application of Article 49, as a provision in Section III (“Occupied Territories”) of Part III of the Geneva Convention, “Status and Treatment of Protected Persons,” was the act of one signatory of the Convention occupying “the territory of a High Contracting Party...”³¹⁵ To Rostow, who noted that Jordan’s own occupation of the West Bank was not recognized internationally, “[t]he West Bank is not the territory of a signatory power, but an unallocated part of the British Mandate.”³¹⁶ Rostow’s reference, in the 4th Geneva Convention, was to the second

³¹⁴ VON GLAHN, *supra* note 203, at 72-74 (no mention in general discussion of Article 49); RENE PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002) (no mention, but would seem to have missed one context in which paragraph 6 might apply on pp.38-9); HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW (2d. ed. Ashgate/Dartmouth 1998)(scant reference at 199). *See infra* note 385 as to this reference. Even G.I.A.D. Draper, whose well known work, RED CROSS CONVENTIONS (*supra* note 161), while calling the sixth paragraph “very important”, devotes one clause of a sentence to it (“Conversely, this Article prohibits the detaining of protected persons in danger areas, and furthermore, which is very important, prevents the Occupant from moving parts of its own population into the occupied territory” *Id.* at 41).

³¹⁵ Rostow, *supra* note 108, at 719. Rostow’s correspondence is in response to the article by Adam Roberts, *supra* note 200, in which Roberts termed this analysis – which he ascribed to Israel -- a “technical error”: “To refer to the terms of the second paragraph of common Article 2 is of limited relevance, because it is in fact the first paragraph that applies when a belligerent occupation begins during a war. [T]his paragraph says nothings about ‘the territory of a High Contracting Party,’ referring simply to ‘all cases of declared war or of any other armed conflict’ arising between two or more of the high contracting parties.” *Id.* at 64. Quoting Chaim Weizmann, the first president of Israel, Rostow argued that Roberts presented “the problem of terminating the Israeli occupation of the territories as if the only relevant legal question were the arbitrary denial of Palestinian national rights”, whereas, quoting Chaim Weizmann, the first president of Israel, “the true issue is ... ‘not the clash of right and wrong, but the clash of two rights.’” Rostow, *Correspondence*, *supra* note 108, at 720.

³¹⁶ *Id.* Robbie Sabel, professor of international law at Hebrew University and former legal adviser to the Israeli Ministry of Foreign Affairs, expresses a similar view in *The Convention does not formally apply*, BITTERLEMONS.ORG, Sep.20,2004, Ed. 35, <http://www.bitterlemons.org/previous/b1200904ed35.html>. David Ball also concludes that Israel’s occupation of the West Bank is governed by Article 2(2) and therefore the 4th Geneva Convention does not apply. David John Ball, *Toss The Travaux? Application of the Fourth Geneva Convention to The middle East Conflict – A Modern (Re)assessment*, 79 N.Y.U.L.REV. 990,1009-16 (2005). Unlike Rostow, however, Ball rests his conclusion not only upon Jordan’s lack of legitimate claim to the West Bank, but on the theory that the Palestinian Authority is a non-state actor cannot avail itself of the Convention’s provisions. *Id.* at 1014-16.

paragraph of Article 2, which states that “[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”³¹⁷

To the extent that Rostow’s conclusion was based upon his positive view of the legitimacy of Israel’s claim to the West Bank – that is, his view that the West Bank is “disputed” rather than simply “occupied” territory – Rostow might have a point. Otherwise, one would arrive at the totally paradoxical result that, for example, once Kuwait’s government reacquired control over its territory after the first Gulf War, it could not construct housing for Kuwaitees because both it and Iraq were signatories to the Geneva Convention. However, to the extent that Rostow’s conclusion was meant solely as an interpretation of the 4th Geneva Convention in light of Jordan’s suspect sovereignty rights, a sensible reading of the application of the Convention described in Article 2 is to the contrary. The vast weight of authority³¹⁸ is that Article 2’s second paragraph expands rather than limits the application of the Convention described in its first paragraph: “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”³¹⁹ In other words, the application of the Convention simply depends upon whether both Jordan and Israel are signatories, not whether the West Bank was legally the territory of Jordan. And Article 6 provides that certain articles of the Convention, including Article 49, binds occupying powers “for the duration of the occupation, to the extent that such power exercises the functions of government in such territory...”³²⁰

(b) Defining the nature of state involvement

Aside from this basic prerequisite for the application of paragraph 6 of Article 49, both the nature of state involvement that would trigger the paragraph’s prohibition and, whatever the definition of that trigger, its

³¹⁷ Final Record, *supra* note 152, Vol. I, at 297.

³¹⁸ For example, the ICJ, in its judgment on the Israeli security fence, see *infra* note 412, and accompanying text, said the following: “The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable. This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power.” 2004 ICJ 136, 175.

³¹⁹ Final Record, *supra* note 152, Vol. I, at 297..

³²⁰ *Id.*, at 298.

application to the Israeli settlements are moot questions. With respect to the more abstract of these questions – what character and degree of state involvement trigger paragraph 6 – one can envision a spectrum, with a variety of legal opinions as to how most points within that spectrum relate to paragraph 6. At one end of the spectrum would be citizens of the occupant voluntarily moving to the occupied country, with the permission of the occupant and under its protection but without any inducements of any nature. At the other end of the spectrum would be an occupant's forcible transfer of its own population into occupied territory.

Closely related to, and arguably influencing, the question of the degree and character of state involvement necessary to violate Article 49's sixth paragraph is the question of purpose, both that underlying the sixth paragraph and that of the occupying power that effectuates the transfer. One might conceive of the purpose of Article 49 as protecting the civilians who are transferred, the population of the territory to which the civilians are transferred, or both. Correlatively, the purpose of the occupying power so transferring its own civilians might be to change the ethnic or racial composition of its own population (that is, to cleanse its own territory of an undesirable ethnicity), to change the ethnic or racial composition of the population in the occupied territory, or, even, to replace the population in the occupied territory with its own nationals.

Unfortunately, neither the language nor the history of paragraph 6 of Article 49 conclusively resolves the issue of the extent and character of state involvement necessary for a violation. Neither do they unambiguously identify those persons intended to be protected by its prohibition. And the only "authoritative" judicial interpretation interpreting Article 49's sixth paragraph, by the High Court of Justice, was given in the context of an advisory opinion concerning Israel's security fence,³²¹ leaving open the question of whether its interpretation will apply apolitically to disputes involving other nations in similar contexts.

(c) The Limits of "plain meaning"

Article 49, in its entirety,³²² deals with transfers of persons -- largely civilians³²³ -- from and to occupied territories, except for their transfer to a

³²¹ See *infra*, notes 412-18, and accompanying text.

³²² See *supra* note 157.

³²³ Article 49 relates to two groups of persons, "protected persons", in the first five paragraphs, and an occupying power's own civilian population in the sixth paragraph. Article 4 defines "protected persons" as follows: Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or

power not a party to the 4th Geneva Convention, which is the subject of present Article 45 of the Convention.³²⁴ Key to an understanding of textual arguments based solely upon paragraph 6's language is Article 49's first paragraph, which reads: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."³²⁵ To settlement opponents, "transfer" in the sixth paragraph -- especially because the adjective, "forcible", which precedes the term, "transfers", in the first paragraph, is lacking -- connotes that any transfer of the occupying power's civilian population is prohibited.³²⁶

This literalist interpretive attempt only succeeds, however, if other "literalisms" are disregarded. If the settlers have moved to the West Bank willingly -- and arguably forced the government to acquiesce in their settlement³²⁷ -- it is questionable that one can say that Israel as an "occupying power" has so transferred them. If it is then argued that the Israeli government has often encouraged the settlers through tax subsidies and other benefits and hence the effect is the same as if Israel had "transferred" them,³²⁸ it should at least be acknowledged that interpretation has transcended the "plain meaning" of words in paragraph 6 to other modes of interpretation. A literalist interpretation would also be self-contradictory if one were to accept Rostow's view that Article 49, like other provisions dealing with occupation in the Geneva Convention, only applies to "acts by

Occupying Power of which they are not nationals." Final Record, *supra* note 152, Vol. I. at 298. But it then excludes certain parties, including any persons protected under the Geneva Convention relative to the Treatment of Prisoners of War. *Id.*

³²⁴ Final Record, *supra* note 152, Vol. I, at 306.

³²⁵ See *supra* note 157.

³²⁶ See Lein, *supra* note 29, at 38.

³²⁷ Even B'Tselem concedes that the part of the settlement enterprise that resulted in the largest number of settlers and settlements close to Palestinian population areas, on the central mountain range of the West Bank, was forced by Gush Emunim, meaning, the Bloc of the Faithful: "The principal method adopted by the movement was to settle a given site without government permission -- and sometimes contrary to its policy -- in an effort to force the government later to recognize the settlement as an accomplished fact." *Id.* at 13.

³²⁸ *Id.* at 39. "State" involvement would include the Ministerial Committee for Settlement, composed of ministers from relevant government ministries and members of the World Zionist Organization, which decides on the establishment of a new settlement, and the Ministry of Construction and housing and the Settlement Division of the WZO which are involved in the actual physical and economic structure of the settlement. See Lein, *supra* note 29, at 20-22. And state encouragement would include certain benefits and financial incentives, which are generally available to development towns in Israel as well, but exceed on a per capita basis the subsidies actually received by residents of settlement towns within the pre-1967 borders of Israel, primarily because of the role played by the Settlement Division of the World Zionist Organization. *Id.* at 73-84.

one signatory ‘carried out on the territory of another,’”³²⁹ a predicate quite problematic given Jordan’s very questionable rights to the West Bank. Settlement opponents rightly emphasize that the Geneva Convention, unlike the Hague Regulations, was designed primarily as humanitarian law to protect people, not to protect dispossessed sovereign states, and therefore argue that the applicability of the Geneva Convention’s occupation provisions should not depend upon such a technicality.³³⁰ That is fair enough, but the present point is that “plain meaning” of words or provisions can be a two-way street. Superficially noting the “plain meaning” of a term like, “transfer”, unmodified by “forceful”, without accepting the plain meaning of “occupying power” or taking into account Rostow’s argument about the Convention’s applicability hardly suffices to derive meaning.

A textual approach that may enlighten is to inquire why the term, “forcible”, may have been used in the first but not sixth paragraph of Article 49. The answer of settlement opponents, of course, is that force is a prerequisite of a violation of the first paragraph, but not necessary for a violation of the sixth.³³¹ But other answers are equally as plausible. Not infrequently, in legislation of all sorts, when similar language is used in several different paragraphs of the same provision, modifying language is dropped because the modifying language is understood.³³² Another explanation is that while the first paragraph is phrased in the passive voice, the sixth paragraph is phrased in the active. Force may be inherent and therefore understood if one speaks about government action, that is, the act of an “occupying power” deporting or transferring parts of its own population, whereas “transfers” without any identified transferor may occur at the instance of actors (including, conceivably, the transferees themselves) in addition to the occupying power and therefore not necessarily imply coercion exercised by one party upon another. And to understand the phraseology used in the first paragraph – “individual or mass forcible transfers” --, as well as one plausible origin of the sixth paragraph, it seems

³²⁹ Rostow, *Correspondence*, *supra* note 108, at 719.

³³⁰ Roberts, *supra* note 200.

³³¹ See, e.g., David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT’L L. 88, 91 (2005) (“As paragraph 1 of Article 49 refers expressly to forcible transfers, it seems fair to conclude that the term ‘transfer’ in paragraph 6 means both forcible and nonforcible transfers.”).

³³² This is essentially the point that Ruth Lapidoth makes specifically in relation to Article 49. See Ruth Lapidoth, *The Status of the Territories: The Advisory Opinion and the Jewish Settlements*, 38 ISR. L. REV. 292 (2005) at 294-95: “According to a well known principle of interpretation, a term which appears several times in a treaty, should usually be given the same meaning in each provision. This applies *a plus forte raison* to a term that appears several times in one and the same article. A look at the other paragraphs of Article 49 shows, that the terms deportation and transfer refer to non-voluntary movement of people.”

necessary to transcend a dictionary definition of words to take account of context, background and purpose.

(d) Context, Background and Purpose

Although an earlier effort to draft and have states adopt an international convention for the protection of civilians preceded World War II,³³³ the 4th Geneva Convention, the product of the Geneva Conference held in the summer of 1949, was drafted in the aftermath of, and took into account the experiences of, World War II,³³⁴ especially the Nazi atrocities that occurred both before and during the war. Throughout, “[t]he discussions were dominated ... by a common horror of the evils caused by the recent World War and a determination to lessen the sufferings of war victims.”³³⁵ The various nations’ delegates at the 1949 Geneva Diplomatic Conference considered a draft of the convention that was the product of a preliminary conference held in Stockholm the prior year, 1948.³³⁶ The Stockholm draft was an amended version of the draft presented to the Stockholm Conference, which in turn was based upon, but replaced, an even earlier draft convention considered by a Conference of Government Experts³³⁷ held in Geneva in the Spring of 1947. Article 49, in the final draft, was the renumbered and partially redrafted successor to Article 45 of the Stockholm draft,³³⁸ which in turn amended the draft of Article 45³³⁹ that

³³³ See 15th International Red Cross Conference, Tokyo, 1934, *Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent*, reprinted in DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* 445 (2004).

³³⁴ In the words of George Best, “This was a long-standing Red Cross project to which the experiences of 1939-45 gave urgency and direction.” Best, *supra* note 163, at 115. See *Id.*, at 80-179 for a description of the stages of considering ideas and drafts that became the 4th Geneva Convention, including the political stances taken by various government as they, in some cases belatedly, realized the dimensions of the convention they were drafting.

³³⁵ JEAN S. PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PRISONERS IN TIME OF WAR (1958) (hereinafter, “Pictet’s Commentary”) at 8.

³³⁶ See Final Record, *supra* note 152, Volume I, at 113-40.

³³⁷ See International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14-26, 1947) (hereinafter, “ICRC Report of Government Experts”). The Conference of Experts was itself preceded by a Preliminary Conference of National Red Cross Societies held in the summer of 1946, which, although dominated by the most recent horrors of the 2d World War, initially considered the question of whether the protection of civilians should be integrated into the convention protecting prisoners of war or required a separate convention. See *id.*

³³⁸ Article 45 in the Stockholm draft reads as follows:

Deportations or transfers against their will of protected persons out of occupied territory are prohibited, whether such deportations or transfers are individual or collective, and regardless of their motive.

had been presented for discussion at the Stockholm conference. That draft of Article 45 succeeded what had been Article 27³⁴⁰ considered at the 1947

The occupying Power shall not undertake total or partial evacuation of a given area, unless the security of the population or imperative military considerations demand. Such evacuations may not involve displacements outside the bounds of the occupied territory, except in cases of physical necessity.

The occupying power shall not carry out such transfers and evacuations unless it has ensured proper accommodation to receive the protected persons. Such removals shall be effected in satisfactory conditions of hygiene, healthfulness, security and nutrition. Members of the same family shall not be separated.

The Protecting power shall be informed of any proposed transfers and evacuations. It may supervise the preparations and the conditions in which such operations are carried out.

The occupying Power shall not deport or transfer parts of its own civil population into the territory it occupies. Final Record, *supra* note 152, Vol. I, at 120-21.

As this was the draft of what became, once renumbered, Article 49, hereinafter renumbered Article 45 refers to that article, unless the text otherwise indicates. For a usage otherwise, see the reference to the Final Article 45 (not the final Article 49) at *infra* note 363, and accompanying text.

³³⁹ Deportations or transfers of protected persons out of occupied territory, whether individual or collective, and whatever their motive, are prohibited.

The occupying Power shall carry out no evacuation, total or partial, of a given area, unless the security of the population or imperative military considerations require. Such evacuations may only take place within the occupied territory, except in cases of material impossibility.

The occupying Power shall undertake such transfers and evacuations only after ensuring to the protected persons proper accommodation to receive them. Such removals shall be effected in satisfactory conditions of hygiene, salubrity, security and nutrition. Members of the same family shall not be separated.

The Protecting Power shall be informed of any proposed transfers and evacuations. It may supervise the preparations and the conditions in which they are carried out. XVIIth International Red Cross Conference (Stockholm, August 1948), International Committee of the Red Cross, *Draft Revised or New Conventions for the Protection of War Victims* at 173 (Geneva, May 1948) (hereinafter, "XVIIth ICRC Conference").

Each article of the draft presented to the Stockholm conference was accompanied by remarks that had been prepared either by the committee that had revised the draft considered at the 1947 experts conference or by the staff of the ICRC. The Legal Commission of the ICRC at that point consisted of : Jean S. Pictet, Director and head of the legal division, and M. MAX HUBER, Honorary President of the ICRC and M. BOSSIER, presumably a member of the ICRC staff., INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON GENERAL ACTIVITIES, July 1, 1947 – December 31, 1948, at 12 (Geneva 1949). The remarks following the text of Article 45 stated:

This Article corresponds to Article 27 of the Draft of the Government Experts. It draws a very clear distinction between deportation of protected persons outside the borders of occupied territory (which is strictly forbidden), and the evacuation of particular areas, which is permitted in two cases, named by way of limitations: (1) if the security of the populations requires; (2) if imperative military considerations demand. It should be noted that the Protecting Power may exercise the right of supervision which is granted to it, without exception, even when, for example, populations are removed outside the boundaries of the occupied territory and transferred to the national territory of the Power in occupation. The Protecting Power may exercise its right of supervision in respect both of the transfers themselves and of the conditions in which they are carried out. XVIIth ICRC Conference, *supra* this note, at 173.

³⁴⁰ Art 27 provided:

Individual or collective deportations or transfer, carried out under physical or moral constraint, to places outside occupied territories, and for whatever motives, are prohibited.

This prohibition applies to all persons in the said territories. It shall not constitute an obstacle to the general evacuation of an area by the occupying Power, if military operations make it necessary. Such evacuation shall not involve the transfer of the population beyond the occupied territory, unless it cannot possibly be effected within the limits thereof.

Collective transfers within an occupied territory shall only be enforced to meet the security requirements of the occupying Power.

Conference of experts. Prior to the Stockholm conference, a legal committee substituted the term, “transfers”, in Article 45’s first paragraph for “removals”, which had been the term used in Article 27’s first paragraph.³⁴¹ But Article 27 lacked any analogue to Article 49’s sixth paragraph, which a legal subcommittee at the Stockholm Conference inserted. The new paragraph became the fifth paragraph in the Stockholm draft of Article 45 considered at the 1949 Geneva Diplomatic Conference.

When the Convention was presented to the conference of delegates in 1949, the text of Article 45’s first paragraph read: “Deportations or transfers against their will of protected persons out of occupied territory are prohibited, whether such deportations or transfers are individual or collective, and regardless of their motive.”³⁴² Delegates from various nations, most notably the Soviet Union,³⁴³ thought the language in the first paragraph, “against their will”, too weak, on the theory that persons could be coerced to consent to expulsions.³⁴⁴ Whether or not the text read as in its original guise, “against their will”, or as redrafted to read, “individual or mass forcible transfers”, the sentence remained in the passive tense, rather than being phrased in the active voice, such as, “The occupying power may not deport or forcibly transfer...” The most probable reason is that the Nazi atrocities to which the first paragraph primarily referred were often carried out not by the Nazis themselves, but the nationals or partisans of the occupied country, for example, Poles or Lithuanians, who rounded up Jews, either for killing in mass pits or for transfer to concentration camps. Hence, the phraseology of the first paragraph prohibited the kind of events that occurred in Poland, Lithuania and other occupied countries, regardless of

The occupying Power shall carry out such transfers and removals with all due regard to the rules of hygiene, salubrity, security and nutrition, not only during the transfer, but also in the area in which the evacuees will be accommodated.

The conditions under which transfers and removals are carried out shall be verified by the Protecting power, or by the competent international body.

In no case shall the above removals and transfers constitute a disguised form of internment or assigned residence.

ICRC Report of Government Experts, *supra* note 337, at 288. Note that Article 27 was drafted as a much more specific text, taken into account the horrors of the 2d World War, in place of Article 19(b) of the Tokyo draft, which read:

Deportations outside the territory of the occupied State are forbidden, unless they are evacuations intended, on account of the extension of Military operations, to ensure the security of the inhabitants. *Id.* at 288.

³⁴¹ Final Record, *supra* note 152, Vol. IIB, at p. 193.

³⁴² Final Record, *supra* note 152, Vol. 1, at 120-21.

³⁴³ See remarks of P. Morosov of the Soviet Union: “The Soviet Delegation further proposed deletion of the words “against their will”, because in occupied territory no one had the right to express an opinion. There was a risk of abuses arising out of the words ‘against their will’”. Final Record, *supra* note 152, Vol. IIA, at p. 664.

³⁴⁴ See remarks of Colonel du Pasquier, the Reporter, in Final Record, *supra* note 152, Vol. IIA, at p. 759.

whether an occupying power, such as the Nazis, or its surrogates committed the atrocities.

The text of Article 49's present sixth paragraph (the Stockholm draft's fifth paragraph) on which the alleged illegality of Israeli settlements is based, remained the same from the Stockholm draft through the adoption of the 4th Geneva Convention. To view its necessity in order to cover more fully the heinous practices that occurred before and during World War II and hence its plausible meaning, reference must be made to the definition of "protected persons", the parties sought to be protected by the initial paragraphs of Article 49, in contrast to the occupying power's own "civilians" referred to in the sixth paragraph. Article 4 provides that "[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."³⁴⁵ In other words, although the Geneva Convention was primarily designed to protect individuals rather than sovereigns, it did exhibit some deference to the concept of sovereignty:³⁴⁶ most of its provisions did not apply to a belligerent power's own nationals or civilians,³⁴⁷ and therefore left uncovered two Nazi practices, engaged in to a lesser extent by other Axis powers: deporting Germany's own Jews and other undesirables to slave and extermination camps in Poland and other occupied countries; and transplanting Germans to portions of Poland and other occupied countries to displace those populations with Germans. The language of the sixth paragraph covered these omissions, as the restrictive definition of "protected persons" protected by Article 49's first paragraph did not include the occupying power's own "civilians."

Besides the question of whether the "against their will" language³⁴⁸ in the first paragraph was strong enough, many of the conference delegates and

³⁴⁵ Final Record, *supra* note 152, Vol. I, at 298. It should be noted that Article 4 then excludes from the category of protected persons "Nationals of a State which is not bound by the Convention", "Nationals of a neutral State who find themselves in the territory of a belligerent State", and "Nationals of a co-belligerent State." *Id.*

³⁴⁶ The exception to this statement are the provisions of Part II of the Convention ("General Protection of Populations Against Certain Consequences of War"), but they are not relevant to the present issues. David Ball similarly stresses the extent to which, behind the humanitarian façade of the Convention, lay the concept of state sovereignty. *See* Ball, *supra* note 316 at 990-92.

³⁴⁷ It should be noted that two other sets of civilians were excluded from the class of "protected persons": nationals of a state not bound by the convention; nationals of a neutral state who are in the territory of a belligerent state if the state of which they are nationals has normal diplomatic relations with the belligerent state; and nationals of a co-belligerent state. *See* Final Record, *supra* note 152, Vol. I, at 298.

³⁴⁸ This language was inserted by a legal subcommittee at the Stockholm Conference into the text of Article 45 prepared for that conference's approval and therefore became part of Article 45's text in the Stockholm draft presented to the Geneva Diplomatic Conference the following year. Its proponent was Albert J. Clattenburg of the U.S. *See* Resume des debats, *infra* note 379, at 62.

the drafting committee members' comments about original Article 45 related to the question of responsibility for protected persons if, for their own protection, they had to be temporarily transferred from the occupied territory to the territory of another power.³⁴⁹ With the exception of these evacuations for the benefit of the population evacuated,³⁵⁰ substantially all references by delegates that concerned "transfers" connoted an involuntary movement of people, whether or not the term, "transfers", was modified by "forcible" and regardless of the paragraph of Article 49 or of another provision of the Geneva Convention in which one found the term.³⁵¹ In the third committee at the Geneva Conference, charged with the final drafting of the 4th Geneva Convention, Adolpho Maresca of Italy "said that in the last war the flower of Italian youth had been sent to Germany in cattle trucks."³⁵² Significantly, he added, "Such forced transfers must at all events be prohibited in the future. The term 'deportation' in the last paragraph of the Article had better not be used, as 'deportation' was something quite different."³⁵³ Maresca, here, was clearly making reference to the text of present paragraph 6, and making the same distinction between "deportations", which some participants saw as legitimate during war time,³⁵⁴ and "transfers", which they condemned as inherently forced and condemned. Representatives of the Soviet Union³⁵⁵ and the Netherlands³⁵⁶ similarly saw transfers as forced rather than

³⁴⁹ See, e.g., the comment of Anna Kara of the Hungarian People's Republic at Final Record, *supra* note 152, Vol. 1 at 347.

³⁵⁰ See *infra* notes 359-62, and accompanying text.

³⁵¹ The one possible exception is this report from the drafting committee as to why it changed the wording of the first paragraph of original Article 45:

"Although there was general unanimity in condemning such deportations as took place during the recent war, the phrase at the beginning of Article 45 caused some trouble in view of the difficulty in reconciling exactly the ideas expressed with the various terms in French, English and Russian. In the end the Committee have decided on a wording which prohibits individual or mass forcible removals as well as deportations of protected persons from occupied territory to any other country, but which permits voluntary transfers." Final Record, *supra* note 152, Vol. 2-A, at 827. This paragraph could be even be interpreted, however, not as indicating a difference between the conduct condemned by the first and sixth paragraphs of the redrafted Article 49, but as substantiating the conclusion that the line of division between prohibited and permitted conduct corresponded to the difference between forceful versus voluntary transfers.

³⁵² Final Record, *supra* note 152, Vol. IIA, at 664.

³⁵³ Final Record, *supra* note 152, Vol. IIA at 664.

³⁵⁴ See, e.g., remarks of Remarks of H.E. Mr. Maurice Mineur of Belgium, Final Record, *supra* note 152, Vol. IIA, at 809.

³⁵⁵ See remarks of P. Morosov, Final Record, *supra* note 152, IIA, at 664. From context, his motion to insert "by force" in the first paragraph was to emphasize this usage, rather than depart from what speakers understood the to be in the text's meaning: "The insertion of the words 'by force' [he had earlier offered an amendment to such effect] would ensure a formal prohibition of the deplorable practices carried out by certain European countries, where men had been loaded into trucks like cattle, and sent to distant countries to do forced labour." (emphasis added)

³⁵⁶ "[Mas] Slamet (Netherlands) agreed with the principles underlying Article 45. In Indonesia, during the last war, numbers of women and children had been transferred to unhealthy climates and forced to build roads, and had died as a result." Final Record, *supra* note 152, Vol. 2-A, at 664.

voluntary, without any comment that its use in the last paragraph of then Article 45 differed.

Colonel du Pasquier of Switzerland, the Reporter for the Committee considering the civilian convention, introduced the final draft of Article 45 to the 3d committee with these words: “the text proposed by the Drafting Committee set forth a principle on which all the members of that Committee had had no difficulty in agreeing, namely, the need to prohibit, once and for all, the abominable transfers of population which had taken place during the last war.”³⁵⁷ Addressing a Belgian fear that a majority vote, at one point, to include “deportation” on the same footing as “transfers” in a draft of Article 41 (Article 45 in the final draft, which applies to transfers to a non-signatory power) would “seriously prejudice the sovereign rights of the States concerned”, Colonel du Pasquier replied, “the provisions of the Convention might be evaded, ‘transfers’ taking place under the guise of ‘deportations.’”³⁵⁸ The Reporter’s comment reinforced the usage, adopted throughout the discussions, that “transfers” were *even more culpable* than “deportations”; hence, inclusion of both terms in the sixth paragraph can hardly connote the use of “transfer” as a voluntary act in contradistinction to “deport” as a forced act. Nowhere in this whole discussion was there any reference to the sixth’s paragraph use of the word, “transfer”, as involving or including voluntary movement. Nor, in these sparse references, can one find any indication that the conference delegates understood the purpose underlying the prohibition of an occupying power transferring its own civilians in the 6th paragraph was other than protecting those civilians who were “transferred.”

In fact, the one usage of the term, “transfer”, in Article 45 that could be construed as importing lack of compulsion reinforces the conclusion that “transfer” in the 6th paragraph implied lack of volition on the part of the population transferred. Because of the blanket prohibition of transfers and deportations in Article 45’s first paragraph, it might have been considered unlawful to transfer protected persons out of harm’s way during warfare for their own benefit. Hence, while the 2d paragraph of the Stockholm draft of Article 45 did bar an occupying power from “undertak[ing] total or partial evacuation of a given area,” this prohibition was succeeded by the clause, “unless the security of the population or imperative military considerations demand.”³⁵⁹ Without any change of meaning, the final draft of the 2d paragraph was rephrased to read: “The Occupying power may undertake

³⁵⁷ Final Record, *supra* note 152, Vol. IIA, at 759.

³⁵⁸ Final Record, *supra* note 152, Vol. IIA, at 809.

³⁵⁹ Final Record, *supra* note 152, Vol. I at 120.

total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.”³⁶⁰ With minor modifications not here relevant, the third and fourth paragraphs then dealt with the necessity of insuring that, in the context where civilians had to be evacuated for their own benefit, proper accommodations would be provided, their health safeguarded, family members would not be separated, and the party in control of the territory to which the civilians were being evacuated would be so informed. In reference to these provisions, the Final Report of the Committee drafting the text for consideration by the plenary meeting of the delegates, referred to the function of the second paragraph in relation to the first paragraph:

Although there was general unanimity in condemning such deportations as took place during the recent war, the phrase at the beginning of Article 45 caused some trouble in view of the difficulty in reconciling exactly the ideas expressed with the various terms in French, English and Russian. In the end the Committee have decided on a wording which prohibits individual or mass forcible removals as well as deportations of protected persons from occupied territory to any other country, but which permits voluntary transfers.

The second paragraph deals with the problem of evacuations made necessary in the interest of the security of the civilian population, or for imperative military considerations. ... This special case constitutes an exception to the first paragraph....³⁶¹

In other words, those transfers which were “voluntary” were those that were permitted, that is, evacuations for the benefit of the civilians in the second paragraph. In that context, the term, “transfer”, was used as a synonym for “evacuations.” In contrast, the transfers in Article 45’s sixth paragraph are of course prohibited, and there is no suggestion anywhere that these prohibited transfers were viewed as anything but involuntary. In this latter context, “transfer” and “deport” were used synonymously.³⁶²

Within the 4th Geneva Convention, the two other primary uses of the term “transfer” relate to protected persons, who are “transferred to a Power not a party to the Convention”³⁶³ – which is prohibited -- and to “internees”,

³⁶⁰ Final Record, *supra* note 152, Vol. I at 307.

³⁶¹ Final Record, *supra* note 152, Vol. IIA, at 827.

³⁶² STONE, *supra* note 118, at 180. This same distinction between mass transfers that are voluntary and those that are involuntary is drawn in De Zayas, *supra* note 33, at 208-09.

³⁶³ Article 45 in Final Record, *supra* note 152, Vol. 1 at 306.

whose transfer must “be effected humanely.”³⁶⁴ Both contexts clearly indicate that “transfer”, again unmodified by “forcible” or a synonym, connotes an act effected by the Detaining Power upon the protected persons or internees, as the case may be, irrespective of their consent. Finally, the 4th Geneva Convention, with which we are concerned, was considered at the same diplomatic conference that considered and adopted three other conventions; in the 3d Geneva Convention, relating to Prisoners of War, “transfer” is used consistently, without any adjectives, to connote an act of the Detaining Power upon them, rather than a voluntary act on the prisoners’ part.³⁶⁵

Without more, then, a textual reading that takes into account the term, “occupying power”, as well as the term, “transfer”, reinforced by the term, “deport,” the use of similar terminology elsewhere in the 4th Geneva Convention, the use of similar terminology in the 3d Geneva Convention, the comments of delegates to the Convention, as well as the overriding context that surrounded the drafting of the Geneva Convention, would seem to support an interpretation that voluntary movement of one’s civilians, done of their own free will, is not prohibited by the sixth paragraph of Article 49. To Julius Stone, writing in reference to this paragraph, “the word ‘transfer’ in itself implies that the movement is not voluntary on the part of the persons concerned, but a magisterial act of the state concerned.”³⁶⁶ Terming a contrary interpretation of the 6th paragraph as “an irony bordering on the absurd”, he commented: “Ignoring the overall purpose of Article 49, which would *inter alia* protect the population of the State of Israel from being removed against their will into the occupied territory, it is now sought to be interpreted so as to impose on the Israel government a duty to prevent any Jewish individual from voluntarily taking up residence in that area.”³⁶⁷ Eugene Rostow concurred that “the provision was drafted to deal with ‘individual or mass forcible transfers of population,’ like those in Czechoslovakia, Poland, and Hungary before and after the Second World War,”³⁶⁸ In contrast, Rostow characterized Jewish settlers in the West Bank as “most emphatically volunteers,”³⁶⁹ and concluded that Jews had every

³⁶⁴ See Article 127, in Final Record, *supra* note 152, Vol. 1, at 323.

³⁶⁵ See, e.g., the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Art. 12, Final Record, *supra* note 152, at 246 (“Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention ...”).

³⁶⁶ STONE, *supra* note 118, at 180.

³⁶⁷ *Id.*

³⁶⁸ Rostow, *Self Determination*, *supra* note 174, at 160.

³⁶⁹ Rostow, *Correspondence*, *supra* note 108, at 719.

right to settle on the West Bank, “equivalent in every way to the right of the existing population to live there.”³⁷⁰

(e) Pictet’s Commentary and its Sources

There is “more”, however, and that additional input casts some doubt on the meaning and purpose of the 6th paragraph. Under the general editorship of Jean S. Pictet, Director Delegate of the International Committee of the Red Cross, the sponsoring organization for the Geneva Conference and the organization under whose auspices the Convention was drafted, members or former members of the ICRC wrote a commentary on the Convention,³⁷¹ published in its original French version approximately seven years after the conference. Like “official comments” of a statute subsequently written by non-legislators who participated in drafting the legislation, there is serious question of what weight to attach to commentary of an international treaty published well after the conference at which the drafts have been discussed, the final draft adopted, and the Convention signed by the delegates from different nations and ratified by various governments.³⁷² Nonetheless, Pictet’s commentary has been given authoritative weight,³⁷³ and therefore must be considered.

Referring to the theme of Article 49 as a whole, Pictet’s commentary states: “it will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions.”³⁷⁴ But the authors were less certain of the role of the 6th paragraph, and commented: “It is intended to

³⁷⁰ *Id.*

³⁷¹ Pictet’s Commentary, *supra* note 335; JEAN S. PICTET, COMMENTAIRE, IV LA CONVENTION DE GENEVE RELATIVE A LA PROTECTION DES PERSONNES CIVILES EN TEMPS DE GUERRE (Comite International de la Croix-Rouge Geneve 1956) (in French). Later references to the text are based upon the English edition of Pictet’s Commentary. The actual authors are identified as Oscar M. Uhler, Frederic Sordet, Roger Boppe, Henri Coursier, Claude Pilloud, Rene-Jean Wilhelm & Jean-Pierre Schoenholzer. Of these parties, Pictet, Sordet, Pilloud, and Wilhelm attended the diplomatic conference as “experts.”

³⁷² Israel signed the Convention on December 8, 1949, and the Knesset ratified the Convention on July 6, 1951.

³⁷³ For example, Kretzmer relies heavily upon it in criticizing the Israeli Supreme Court’s views on Article 49. *See* KRETZMER, *supra* note 204, at 49-50. Significantly, Kretzmer’s preference for Pictet over Julius Stone’s views (which the court has relied upon) proceeds not only from Pictet’s status as the editor in chief of the ICRC commentary, the ICRC being the sponsoring organization of the Convention, but also the fact Pictet’s Commentary “was written before 1967, was not related to any specific conflict and is therefore obviously an objective view of the Convention.” What Kretzmer does not mention is, as noted in the text, that Pictet authored his Commentary well after the delegates at the Geneva Diplomatic Conference discussed, approved and signed the Convention on behalf of their governments and their governments had ratified it.

³⁷⁴ *Id.* at 278-79, cited in STONE, *supra* note 118, at 178-79.

prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons *or* in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.”³⁷⁵ Moreover, in addition to the above, the authors posited that “[i]t would therefore appear to have been more logical – and this was pointed out at the Diplomatic Conference[fn.3] – to have made the clause in question into a separate provision distinct from Article 49, so that the concepts of “deportations” and “transfers” in that Article could have kept throughout the meaning given them in paragraph 1, i.e., the compulsory movement of protected persons from occupied territory.”³⁷⁶

In other words, Pictet’s commentary suggests two things that might give pause with respect to the prior conclusion that the 6th paragraph was intended to protect the civilians of the occupying power’s own country (e.g., Germany) from their forcible transfer to the occupied territory (e.g., Auschwitz or other concentration camp in Poland). The first is that the purpose of the sixth paragraph was the protection of two sets of parties: the occupied power’s own civilians transported against their will into occupied territory; and the native people of the occupied territory. The second is the suggestion that the terms, “transfer” and “deport”, were not used with the same connotation of involuntariness or compulsion that these terms connoted in Article 49’s first paragraph.

To the extent that the purpose was to protect the racial purity or economic situation of the native population, could it not be argued that the sixth paragraph of Article 49 should be interpreted most liberally and broadly against any actions of an occupying power that sponsor or promote the movement of an occupant’s population into the occupied territory?³⁷⁷ Indeed, Palestinians and settlement opponents argue quite vigorously that the settlement enterprise had as its intent to change the demographic composition of the West Bank. And does not the suggestion of a different meaning or usage of “transfer” and “deport” in the sixth than in the first paragraph support the notion that Israel’s actions, -- allegedly a combination of subsidies, tax and otherwise, infrastructure improvements for the use of such settlements and confiscation of Arab lands³⁷⁸ -- have violated the sixth

³⁷⁵ *Id.* (emphasis added) For an example of a citation of this quote without further inquiry into the sources relied upon in the text, see Imseis, *supra* note 104 at 103.

³⁷⁶ *Id.*

³⁷⁷ See Kretzmer, *Advisory Opinion*, *supra* note 331, at 91.

³⁷⁸ For example, Roberts opined that “even if voluntary settlement of nations on an individual basis were permissible under Article 49, the ambitious settlements program of the 1980s, which was planned,

paragraph's prohibition? But, while the historical record does provide support for the first notion (that the beneficiaries of the 6th paragraph's prohibition included the native population of the occupied territory), it does not confirm the latter (that "transfer" as used in the 6th paragraph, unlike its usage in the first paragraph, did not connote compulsion).

There *is* support for the idea that the prohibition against the occupying power transferring its own civilian population into occupied territory had, at least as one of its purposes if not its primary purpose, the protection of the native population. Pictet's Commentary cites as support several pages in a type-written report that tersely *summarized* discussions in a sub-committee of the Legal Commission at the Stockholm Conference (interestingly, this is the only cite to this source in the entire commentary on the 4th Geneva Convention).³⁷⁹ The reference seems to have been directed primarily to the

encouraged and financed at the governmental level, does not meet that description." Roberts, *supra* note 200, at 85. He then concludes that "[t]he settlement program is quite simply contrary to international law" (id.), but gives no authority for such except UN General Assembly Resolutions. Elsewhere, Roberts admits to bias that can result in the UN General Assembly passing any resolution brought up against Israel, including the infamous 1975 resolution equating Zionism (that is, the whole notion that Jews have the right to statehood) with racism. *Id.* at 100.

³⁷⁹ Résumé des débats des sous-commissions de la Commission juridique [de la] XVII^e Conférence internationale de la Croix-Rouge, Stockholm, août 1948. - [Genève : CICR], décembre 1948. - 91 p. 30 cm (Document ronéographié), cited in Pictet's Commentary as XVIIth International Red Cross Conference, Legal Commission, at 61-2. Because this summary seems not to be available either in the United States or on the internet, the notes kept from the meeting are presented below, with the scant recorded introduction of the proposal at a first meeting, its tabling until a second meeting, its contraction and the ambiguous references of various participants.

Discussion of Article 45 at first meeting:

M. Cohn (Danemark, Gvt.) propose d'ajouter un nouvel alinéa ainsi conçu: "La Puissance occupante ne pourra pas procéder à la déportation ou au transfert d'une partie de sa propre population ou de la population d'un autre territoire qu'elle occupe dans le territoire occupé par elle", ceci afin de protéger la population d'un Etat occupé contre une invasion de personnes.

M. Pilloud (CICR), croit qu'il s'agit là plutôt des devoirs de la Puissance occupante, ce qui n'est pas entièrement du ressort de la Croix-Rouge internationale. Nous devons chercher à protéger plutôt les ressortissants d'un pays.

M. Castner (Norvège, Gvt.) appuie la proposition de M. Cohn car il estime que ce nouvel alinéa protégerait les nationaux d'un pays occupé contre un envahissement de personnes venant d'autres territoires et qu'il faudrait nourrir, etc.

La Commission, sur proposition de MM. Holmgren (Suède, CR.) et Abut (Turquie, CR.), décide de différer sa décision sur cet article et d'attendre que la proposition de M. Cohn ait été distribuée.

M. Clattenburg (YSA, Gvt.) demande qu'au premier alinéa de l'article 45 on ajoute "contre leur gré" après "les déportations ou transferts". Cette proposition est adoptée. L'article 45 avec ou sans addition de la proposition de M. Cohn sera mis aux voix lors de la prochaine séance. *Id.* at 61-2.

remarks of Dr. Georg Cohn of Denmark, who initially introduced the provision with explicit reference to “protecting the inhabitants of an occupied State against an invasion of people.”³⁸⁰ Cohn’s initial provision would have prohibited an occupying power from deporting or transferring a “part of its own inhabitants *or the inhabitants of another territory which it occupies*” into the occupied territory.³⁸¹ Claude Pilloud, then the Chief of the Legal Division of the International Committee of the Red Cross, reacted, seemingly with some skepticism, with ambiguous references about some aspect of Cohn’s proposal directed “more at the duties of the occupying power, which is not entirely within the competence of the International Red Cross”, but then concluded: “We should therefore try to protect a country’s nationals.” It is unclear from the abbreviated summary whether Pilloud’s reference to “a country’s nationals” referred to the transferred population of the occupying power or the inhabitants of the occupied territory.³⁸²

The proposal to add the provision was first shelved to allow interested parties to consider it. Cohn reintroduced his text at the next subcommittee

Discussion of Article 45 at next meeting:

M. Cohn (Danemark, Gvt.) propose l’addition suivante à l’article 45:

“La Puissance occupante ne pourra pas procéder à la déportation ou au transfert d’une partie de sa propre population ou de la population d’un autre territoire qu’elle occupe dans le territoire occupé par elle.”

Après une discussion à laquelle ont pris part M. Clattenburg (USA, Gvt.) qui estime que cet alinéa a un sens beaucoup trop étendu, M. Wershof (Canada, Gvt.) et M. Pilloud (CICR), la sous-commission adopte cet alinéa modifié comme suit:

“La Puissance occupante ne pourra procéder à la

déportation ou au transfert d’une partie de sa propre

population civile dans le territoire occupé par elle”.

M. Wershof (Canada, Gvt.) signale qu’il s’est abstenu de voter, non qu’il réproouve les sentiments exprimés dans cet alinéa, mais il estime que cette conférence n’est pas habilitée pour examiner dans cet alinéa des questions de ce genre et trouve que la Convention n’a pas pour but de montrer à des Nations comment elles doivent faire la guerre. *Id.* at 77-8.

³⁸⁰Résumé des débats des sous-commissions de la Commission juridique [de la] XVII^e Conférence internationale de la Croix-Rouge, Stockholm, août 1948. - [Genève : CICR], décembre 1948. - 91 p.; 30 cm (Document ronéographié), cited in Pictet’s Commentary as XVIIth International Red Cross Conference, Legal Commission, at 61-2.

³⁸¹ *Id.*

³⁸² In the French, Cohn used the phrase, “la population d’un Etat occupé”, while Pilloud used the term, les ressortissants d’un pays.” *Id.*

meeting, without reference to the intended beneficiaries of the prohibition.³⁸³ Other participants at the subcommittee committee, led by Albert J. Clattenburg, Jr. of the United States, thought the provision was too broad. After discussion, the language, “or the inhabitants of another territory which it occupies”, was deleted, and the word, “civil”, was added prior to “inhabitants” in the French text.

Shortly after the 1949 Geneva Conference, Hersh Lauterpacht, published the 7th edition of *Oppenheim’s International Law*³⁸⁴, in which he opined that the paragraph’s “prohibition [was] intended to cover cases of the occupant bringing in its nationals for the purpose of displacing the population of the occupied territory.”³⁸⁵ Lauterpacht, the very distinguished English law professor and member of the International Court of Justice, had been a legal expert to the International Committee of the Red Cross at a committee of experts in December of 1948, but that meeting apparently concerned certain “grave breaches” provisions common to all four of the Geneva Conventions and occurred subsequently to the Stockholm Conference at which the language of the fifth paragraph was introduced and fixed.³⁸⁶ In the preface to his edition of Oppenheim’s text, Lauterpacht

³⁸³ *Id.* at 77-8. Note that Cohn’s original text would also have prohibited the Occupying Power from deporting or transferring, not only parts of its own inhabitants, but also the inhabitants of another territory which it occupies, into the occupied territory. Arguably, although this reference to the inhabitants of another territory does not relate to whether the primary purpose of the provision was to protect the transferred parties or native population of the occupied territory, it does suggest that “transfer” was still referring to movements of people determined by the Occupying Power rather than movement of people of their own free will. The phrase, “or the inhabitants of another territory which it occupies,” was deleted, at the suggestion of Albert E. Clattenburg, Jr., one of those representing the United States, who thought the paragraph “too extensive.” Clattenburg at the time was the First Secretary of the U.S. Embassy in Lisbon, and had been Chief of Special War Problems Division, Department of State, during World War II. In the latter capacity, he apparently resisted an attempt to save Jews interned at the Bergen Belsen concentration camp by exchanging them for interned Germans in South America (See Max Paul Friedman, *The U.S. State Department and the Failure to Rescue: New Evidence on the Missed Opportunity at Bergen-Belsen*, 19 HOLOCAUST AND GENOCIDE STUDIES, No. 1, 26-50, at 40 (Spring 2005)) and participated in a program of interning Japanese Peruvians during World War II. See Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUMAN RIGHTS & DEVELOPMENT L.J. 53, n.79 and accompanying text, at 69-70 (1999). In addition, Cohn’s proposal at the two meetings had no adjective prior to the word, “inhabitants.” As adopted by the Committee, the French word for “civil” was inserted prior to inhabitants. XVIIth International Red Cross Conference, Legal Commission, *supra* note 379, at 78.

³⁸⁴ HERSCH LAUTERPACHT, ED., *OPPENHEIM’S INTERNATIONAL LAW*, VOL.II DISPUTES, WAR AND NEUTRALITY (7th ed., David McKay Company, 1952).

³⁸⁵ *Id.* at 452. This would seem to be the same meaning suggested by one modern text of international humanitarian law, written without any reference to Israel and the West Bank: “Once occupation is established, individual or mass forcible transfers or deportation are prohibited, apart from the evacuations dictated by imperative military necessity...In no circumstances may *evacuated* areas be repopulated by nations transferred from the home territories of the occupying power.” MCCOUBREY, *supra* note 314, at 199 (emphasis added).

³⁸⁶ BEST, *supra* note 163, at 93-4..

thanks Pilloud, of the ICRC, “for information concerning the Geneva Conventions of 1949.”³⁸⁷ Pilloud, who, as mentioned above, was chief of the Legal Division of the ICRC and a participant at the legal subcommittee meeting at the Stockholm conference, is also listed as one of the authors of Pictet’s Commentary, although not the principal one. It is a reasonable assumption that Lauterpacht divined the meaning of the paragraph from Pilloud.

Pictet’s Commentary itself notes that “[a]fter passing through these various stages, the draft texts were taken as the only working documents for the Diplomatic Conference ...”³⁸⁸ – i.e., it appears that the delegates did not have the summaries of the committee discussions before them, and those delegates who spoke with respect to then Article 45 did not include the members of the legal subcommittee that added its fifth (later, Article 49’s sixth) paragraph. In any event, while it may be unclear whom the Geneva delegates understood to be the intended beneficiaries of the prohibition in the paragraph, all explicit references by delegates to “transfers” – whether of protected persons, internees, the occupying power’s civilian population, or others – seemed to focus either upon the need to protect the transferred population or, in the context of transfers for the benefit of transferees (e.g., for their own safety) upon the necessity of notification to, and having regard for the other needs of, the “protecting power” to whose caretaking they would be transferred.

Certainly, the theme of racial or ethnic purity expressed in Pictet’s Commentary cannot be found in either the remarks of the legal subcommittee that inserted the provision into then Article 45 or elsewhere in the 4th Geneva Convention. Quite the contrary. Article 13, the first provision of Part II (General Protection of Populations against Certain Consequences of War), which applies even if the parties affected are not “protected parties” under the Geneva Convention, states that the provisions of Part II “cover the whole of the population of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion...”³⁸⁹ Part III (Status and Treatment of Protected Persons) provides that “all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.”³⁹⁰ And, of course, modern trends in international human

³⁸⁷ See LAUTERPACHT, *supra* note 384, at Preface, p.vii-viii.

³⁸⁸ Pictet’s Commentary, *supra* note 335, at 6.

³⁸⁹ Art. 13, Final Record, *supra* note 152, Vol. 1 at 300.

³⁹⁰ Art. 27, Final Record, *supra* note 152, Vol. 1 at 303.

rights law, including negative views of immigration restrictions based upon color or ethnicity and positive views of granting political asylum,³⁹¹ show no respect for a notion of preserving the racial composition or ethnic integrity of the country of immigration, although they do evince support for self-determination.

In less racial terms,³⁹² whatever the intent of those who promoted settlement – the negative one sometimes imputed to Israel by its opponents – to displace the Palestinian population with Israeli Jews -- or a positive one -- facilitating the rights of Jews to live on the West Bank without prejudice to the rights of Palestinians³⁹³ – it is difficult to argue that Jewish settlements have altered materially the ethnic balance of the West Bank.³⁹⁴ Excluding disputed neighborhoods in Jerusalem and settlements contiguous to the pre-1967 armistice lines, Jews at most constitute no more than 8 percent of the West Bank's population, less than 4 percent of a Palestinian state that would include Gaza, and an even smaller percentage of the population if at least some Palestinian refugees return to live in either the West Bank or Gaza.³⁹⁵ Moreover, while the 1967 War, like the 1948 War, produced some refugees, there is no evidence that there was any nexus between any Arab refugees in 1967 and any plan to construct and populate Jewish settlements. This situation differs substantially, then, from efforts by the Soviet Union to alter

³⁹¹ See, e.g., Article 14, ¶1, of the Universal Declaration of Human Rights, which provides: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

<http://www.hrweb.org/legal/udhr.html> (last viewed Jan. 21, 2006).

³⁹² See the population discussion, *supra* note 29.

³⁹³ See Israel Ministry of Foreign Affairs, Israeli Settlements and International Law, May, 2001, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Settlements+and+International+Law.htm> (last viewed, Feb. 2, 2006) ("...the movement of individuals to the territory is entirely voluntary, while the settlements themselves are not intended to displace Arab inhabitants, nor do they do so in practice"). See also Arye Naor, "Behold, Rachel, Behold": *The Six Day War as a Biblical Experience and its Impact on Israel's Political Mentality*, 24 THE JOURNAL OF ISRAELI HISTORY, No. 2, 229-250, (September 2005), who notes that Menachem Begin, while a believer in a Greater Israel that would include the West Bank, rejected the notion of denying equal rights to Palestinians and "believed that both Jews and Arabs would live in peace and harmony in the State of Israel..." *Id.* at 243-44.

³⁹⁴ One can also note that the Palestinian economic situations improved appreciably from 1967 through 1995 (the approximate date that the Palestinian Authority assumed control over most of the West Bank's population). Life expectancy increased, infant mortality fell, and medium to strong economic growth occurred. See the Zimmerman group, *supra* note 29. On the other hand, it can also be argued that Palestinian dependence on the Israeli economy itself had a negative effect that presently requires substantial recovery.

³⁹⁵ During the first decade of Israeli control over the West Bank, the numbers of settlers, approximately 2,000, and the percentage of the population the settlers constited, approximately ½ of 1 percent, were even smaller (GERSON, *supra* note 160, at 174), but at that point there was no movement on the Arab side to make peace. Certainly, during the first decade when the Labor party still dominated the Israeli government, "in the perspective of contemporary international law, Israel's land acquisition and settlement policy was not unlawful as it neither aimed for, nor neared, a stage involving displacement of the existing population as a prelude to future annexation." GERSON, *supra* note 160, at 173.

the ethnic makeup of the Baltic States, by initially deporting hundreds of thousands of people and then encouraging Russian immigration into them,³⁹⁶ or by China to alter the ethnic makeup of Tibet, by forcibly scattering its native population and moving Chinese into Tibetan territory in their stead.³⁹⁷

With respect to the Pictet Commentary's support for "transfer" possibly having a meaning different from elsewhere in Article 49's text, its footnote 3 refers solely to that page in the Final Record of the Geneva conference containing the remarks of delegates Morosov of the Soviet Union, Slamet of the Netherlands, Maresca from Italy (discussed previously), none of whom suggested that the 6th paragraph be removed to a different separate article and all of whom referred to "transfers" in the negative sense as involving force and compulsion.³⁹⁸ At the close of the 16th committee meeting considering the civilians' convention, Mr. Georges Cahen-Salvador of France, chair of the committee, was reported to have summed up the discussion concerning the whole of Article 49 in the following way: "The Chairman, before declaring the discussion on article 45 closed, noted that the Committee was unanimous in condemnation of the abominable practice of deportations. The sole purpose of every speaker had been to strengthen the interdictory provisions of the Article. He suggested that deportations should, in the same way as the taking of hostages, be solemnly prohibited in the Preamble."³⁹⁹ The delegates, meeting as a committee before the draft was presented to the plenary session for approval, then proceeded to discuss succeeding articles. No one argues that Israel forcibly moved settlers into the West Bank, although, as part of the Gaza disengagement, Israel did forcibly *remove* settlers from four settlements in

³⁹⁶ See THOMAS A. ARMS, *ENCYCLOPAEDIA OF THE COLD WAR* 43 (Facts on File 1994). While the deportations began under Stalin in 1945, prior to the 4th Geneva Convention, the movement of Russians in to the Baltic States continued even under Khrushchev and Brezhnev "so that by 1980 of 1.5 million citizens in Estonia, only 900,000 were ethnic Estonians." *Id.* For a description of the forced deportations of hundreds of thousands of natives of the Baltic States and the Russification of Estonia, Latvia and, to a lesser extent, Lithuania, see also WALTER C. CLEMENS, JR., *BALTIC INDEPENDENCE AND RUSSIAN EMPIRE* 56-7(1991); JOHN HIDEN & PATRICK SALMON, *THE BALTIC NATIONS AND EUROPE* 131(rev'd ed., Longman, 1994) ("By 1979 ethnic Latvians constituted only 38.3 percent of their own capital, Riga."); ROMUALD J. MISIUNAS & REIN TAAGEPERA, *THE BALTIC STATES, YEARS OF DEPENDENCE 1940-1990* (1993) (about 1/10 of Latvian and Estonian farmers were deported, *Id.* at 102, and "The Latvians' share of their country's population was probably around 83 percent in 1945, but dropped to about 60 percent by 1953, due to immigration and deportations.", *Id.* at 112).

³⁹⁷ See John S. Hall, *Chinese Population Transfer in Tibet*, 9 *CARDOZO J. INT'L & COMP. L.* 173 (2001). The reticence of the international community actively and vociferously to criticize China's human rights record in this regard is explored in Philip Baker, *Human Rights, Europe and the Peoples Republic of China*, *THE CHINA QUARTERLY* 45-63(2002), also available at <http://www.journals.cambridge.org/action/displayAbstract?fromPage=online&aid=101319>.

³⁹⁸ See *supra* notes 348-56, and accompanying text.

³⁹⁹ Final Record, *supra* note 152, Vol. IIA, at 664.

the Northern West Bank and has since begun to evacuate, with force, illegal outposts having some permanent residents.

(f) Other Considerations – Avoiding Absurdity and Circularity, and Taking Account of the Element of Time

Several other considerations – most notably, avoiding absurd conclusions, avoiding circularity of meaning and taking account of the element of time, – counsel against the conclusion that Israeli settlements violate Article 49's sixth paragraph, especially on the basis of preserving any alleged racial or ethnic purity of Palestinians. While Julius Stone considered Israeli settlements in compliance with both of the themes that, at least in his reading of Pictet's Commentary, inhered in Article 49's sixth paragraph – protecting the occupying power's own civilians from transfer against their will and protecting the nationals of the occupied territory from a mass influx that historically had often accompanied forcible transfer of nationals out of occupied territory -- he did have the following to say about a conclusion that Israel had any obligation to keep Israeli volunteers from settling on the West Bank:

...[W]e would have to say that the effect of Article 49(6) is to impose an obligation on the state of Israel to ensure (by force if necessary) that these areas, despite their millennial association with Jewish life, shall be forever *judenrein*. Irony would thus be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*, has now come to mean that ...the West Bank... must be made *judenrein* and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants.

Common sense as well as correct historical and functional context exclude so tyrannical a reading of Article 49(6)...⁴⁰⁰

Stone's observation invites a hypothetical: suppose that a group of Palestinian Arabs who are citizens of Israel requested permission to establish a community on the West Bank. Without loss of their citizenship, Israel facilitated the community's establishment on land that this group was able to purchase from other Palestinian Arabs (not citizens of Israel) or on state

⁴⁰⁰ STONE, *supra* note 118, at 180.

land. Would establishment of this settlement violate Article 49's sixth paragraph? If not, how can one distinguish the hypothetical from Jewish settlements?

Those who most vigorously allege that Jewish settlements violate the sixth paragraph generally tend not to differentiate between those settlements established prior to or subsequent to actions on the part of the Israeli government that, for a time, are said to have promoted settlement activity; to these opponents, the military government's permission to establish a settlement itself would have been prohibited. An argument that only Jewish settlement without any state involvement would satisfy Article 49, therefore, leads to another absurdity, to wit, that only Jewish settlements unauthorized by the military commander and therefore illegal under Israeli law⁴⁰¹ are lawful under Article 49. Only the occupants of these illegal outposts would seemingly truly qualify as "volunteers" not related in any way to Israeli government action!

Circularity of interpretation is also to be avoided. Concluding that Israeli settlements violate the sixth paragraph of Article 49 also overlooks the fact that Jewish communities formerly existed in some of the areas that are today defined as Israeli settlements, for example, in Hebron and in the Etzion Bloc.⁴⁰² These Jewish communities were destroyed by Arab armies, militias, and/or rioters, and, as in the case of Hebron, the community's population slaughtered. Does it make sense to interpret Article 49 to bar the reconstitution of Jewish communities that were themselves destroyed through aggression and slaughter? If so, the international law of occupation runs the risk of freezing one occupier's conduct in place, no matter how unlawful. And under what theory can one then distinguish between settlements and the reconstruction and repopulation of the Jewish quarter of Jerusalem's old city, which was also destroyed by the Jordanians in its 1948 occupation of the West Bank?⁴⁰³ An answer that these acts of Arab aggression against Jewish communities preceded the Geneva Convention, whereas the establishment of Jewish settlements on the West Bank succeeds it, would be a "technicality" hardly consistent with a view that Article 2's

⁴⁰¹ See the Sason Report, *supra* note 2.

⁴⁰² See Lein, *supra* note 29, at 11: "As early as September 1967, Kfar Ezyon became the first settlement to be established in the West Bank. It was established because of the pressure of a group of settlers, some of whom were relatives of the residents of the original community of Kfar Ezyon, which was abandoned and destroyed during the 1948 war."

⁴⁰³ To its "credit" on grounds of consistency, B'Tselem does not do so, characterizing the Jewish quarter in the Old City as a "settlement." *Id.* at 103. Most people would presumably recoil at this characterization in that the property in this area had been owned and populated by Jews for centuries (if not millennia), the synagogues were destroyed during Jordanian occupation, and Judaism's holiest site, the Western Wall, lies at the edge of the area.

provision as to when the Convention applies to occupied territory is a “technicality” not to be relied upon or the view that “occupying power” and “transfers” should be interpreted most broadly to accord with the Convention’s humanitarian purposes.

Suppose that, irrespective of any textual, contextual, historical or purposive analysis and no matter how voluntarily Jews have moved to civilian settlements on the West Bank, one still wishes to conclude that the initial establishment of Israeli civilian settlements on the West Bank violated Article 49’s sixth paragraph. Substantially, all legal systems take account of the element of time, which bears on both the relevance of legal doctrine as well as the equities of parties involved.⁴⁰⁴ International law is no exception. For example, after substantial time has passed where one has been dispossessed of property, should one have a right of repossession or a right to compensation under international law? Generally, the international practice has been, at best, to grant compensation rather than a right to repossession based upon dated claims. And, even then, compensation has been based upon what Benvenisti and Zamir have called “adequate compensation” rather than “fair value.”⁴⁰⁵ No one disputes that the Hague Regulations were designed to regulate short term occupations.⁴⁰⁶ While it has been argued that the Geneva Convention, because its focus is the protection of people rather than simply sovereign states, does not necessarily presuppose that only short term occupations are meant to be regulated by its provisions, no one contends that even its drafters or signatories contemplated a *lawful* belligerent occupation lasting close to 40 years.⁴⁰⁷ As George Best has written, “[t]he makers of the Civilian Conventions can never have envisaged a military occupation as unprecedentedly prolonged as this, or circumstances as intractable as those which tangle together the new State of Israel, the neighbouring Arab States (most of them in some sense new too), and the dispossessed Palestinian people bearing the aspect of a State-in-waiting.”⁴⁰⁸ In its original guise, in fact, the Geneva Convention included a one-year provision after which only certain of its provisions would continue

⁴⁰⁴ A domestic example might be the doctrine of adverse possession, where open use of another’s property after a certain number of years results in title passing to the occupier from the original owner.

⁴⁰⁵ See Benvenisti & Zamir, *supra* note 34, at 328-31.

⁴⁰⁶ See Benvenisti, *supra* note 133, 7-3.

⁴⁰⁷ Roberts, *supra* note 200 (“the Fourth Geneva Convention was designed to protect the civilian population under an essentially temporary occupation”), although the same author elsewhere states, “The proposition that the basic rules codified in the law on occupations must continue to be observed for as long as the occupation lasts is a useful compass bearing to guide one through this difficult subject.” *Id.* at 54.

⁴⁰⁸ See BEST, *supra* note 163, at 316.

to be binding on signatory states.⁴⁰⁹ Surely, there is a difference between a lawful occupation that, say, lasts five⁴¹⁰ to ten years (relatively, “long” in terms of the Hague Regulations) than one that lasts forty years or more. At some point it becomes absurd to argue that an occupying power cannot permit its own citizens to settle in disputed land⁴¹¹, which is not privately owned, especially in areas once occupied by Jews, simply because they belong to the dominant ethnic group of the occupying power. The contrary conclusion could well be reached if, consistent with Security Council Resolution 242 and 338, Arab states had negotiated and arrived at peace treaties with Israel, or if the Palestinians had accepted a negotiated settlement of all claims with Israel in 2000, that is, if the occupation had persisted not because of Israel’s legitimate security concerns but because of Israel’s refusal to settle all claims with the Palestinians. It can even be argued that, at some point, uprooting the settlers itself becomes a wrong comparable to those at which Article 49 is directed. In short, even if one adopts an interpretation of the Geneva Convention that would dictate the initial illegality of Israeli settlements, both time and culpability in failing to resolve the conflict should be accorded some weight in adjudging their present legality.

(g) Judicial interpretation

The *only* instance of the International Court of Justice applying and/or interpreting paragraph 6 of Article 49 was its advisory opinion in 2004, in response to a request from an emergency session of the United Nations

⁴⁰⁹ Art. 6, ¶3, amended by the 1977 Geneva Protocol I. *See* Roberts, *supra* note 200, at 55. Although Israel never ratified the Protocol, it has never relied upon Art. 6 for its position that the Geneva Convention does not apply to its control over the West Bank, although it has insisted that its conform to the Convention’s humanitarian provision. *See id.* (“Israeli authorities have never invoked it as a means of reducing their obligations.”). In any event, the one-year provision specifically does not apply to Article 49. *See* Final Record, *supra* note 152, Vol. I, at 298.

⁴¹⁰ Roberts defines a “prolonged occupation” as one “that lasts more than 5 years and extends into a period when hostilities are sharply reduced –i.e., a period at least approximating peacetime.” Roberts, *supra* note 200, at 47. Roberts, who is critical of Israeli settlement building, wrote in 1990 at a period when Israel’s control over the West Bank was approaching 25 years. That is a far cry from the 40 years that is now imminent. Moreover, while the consideration of time might be analyzed differently if the failure to end the hostilities and the resultant occupation primarily lay at Israel’s feet, but the weight of authority is to the contrary. *See supra* notes 179-98, and accompanying text.

⁴¹¹ In this regard, one of the weightiest grounds given by an opponent of Israeli settlements – that some were established on territories the sovereignty over which by another nation was not disputed – does not apply to the West Bank. *See* Roberts, *supra* note 200, at 64-65.

General Assembly, that Israel's security fence violates international law.⁴¹² Israel appeared only to contest the Court's jurisdiction. For the most part, the fence follows the route of the Green Line, but is in many instances constructed to its east, that is, in the West Bank. Writing for the ICJ, its President, Shi Jiuyong of China, reiterated the commonly accepted position that the 4th Geneva Convention does apply to Israel's control over the West Bank. In his opinion, he also opined that Israeli settlements violate Article 49's sixth paragraph, which he interpreted as "prohibit[ing] not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory."⁴¹³ As support, the opinion cited three resolutions adopted by the Security Council in 1979 and 1980,⁴¹⁴ but the Court did not otherwise buttress its interpretation with any reference to the drafting history of paragraph 6, the understandings at the Geneva Diplomatic Conference, the Nazi behaviors towards which the whole of Article 49 was directed, or contrary views.

From the Court's perspective, its opinion regarding paragraph 6 was hardly *dictum*, however. In addition to protecting the lives of soldiers and Israeli civilians living within the Green Line, protecting the lives of Israeli settlers on the West Bank seems to have constituted one purpose that explained the positioning of the fence, at least at the time of the Court's opinion.⁴¹⁵ Implicit in the court's opinion, therefore, was the notion that such a purpose could not serve as justification for constructing a fence on occupied territory. On the other hand, since the Court held that all parts of the fence lying within the West Bank were unlawful – and not simply those parts that were designed to protect settlers – its view of the scope of paragraph 6 was actually irrelevant to its broad decision with respect to the

⁴¹² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136 (July 9, 2004) (hereinafter, "ICJ Wall opinion"). The opinion was sought by tenth emergency special session of the United Nations General Assembly. Israel appeared only to contest the court's jurisdiction.

⁴¹³ *Id.* at 183.

⁴¹⁴ S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979) ; S.C. Res. 452, U.N. Doc. S/RES/452 (July 20, 1979); S.C. Res. 465, U.N. Doc. S/RES/465 (Mar. 11 1980). The last of these resolutions described "Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories" as a "flagrant violation" of the Fourth Geneva Convention."

⁴¹⁵ The court stated: "it is apparent from an examination of the map mentioned in paragraph 80 above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem)." ICJ Wall Opinion, *supra* note 412, at 183. It should be noted, however, that the positioning of the security fence has shifted a number of times since, sometimes at the instance of questioning by the Israeli Supreme Court. See *infra* notes 421-23, and accompanying text.

fence.⁴¹⁶ The vote of the court was fourteen to one. While six justices who joined the majority wrote separate opinions, none expressed a difference of opinion with respect to Article 49's sixth paragraph. The sole dissenter was Justice Thomas Buergenthal, who thought that the court should have declined to exercise jurisdiction in light of the fact that "the court did not have before it the requisite factual bases for its sweeping findings."⁴¹⁷ Nonetheless, even he agreed that Article 49 "applies to the Israeli settlements in the West Bank", that "their existence violates ... paragraph 6", and that "[i]t follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law."⁴¹⁸

In *Elon Moreh*, the 1979 Israeli Supreme Court decision that greatly impacted that land on which subsequent Israeli settlements were established, Justice Witkon, unlike his other colleagues deciding the case, was prepared to say that the 4th Geneva Convention applied to Israel's control over the West Bank. However, he noted in his concurring opinion, "the question whether voluntary settlement falls under the prohibition of "transferring sections of the population" within the meaning of Article 49(6) of the Geneva Convention is not an easy one and ... no answer has yet been found in international jurisprudence."⁴¹⁹ The view expressed by Justice Witkon about the applicability of the 4th Geneva Convention to Israel's control over the West Bank presaged a subtle shift on the part of the Israeli Supreme Court as a whole. In later cases, the Court did measure Israeli actions against the standards of the Convention's humanitarian provisions, in part because the government of Israel -- despite its official stance regarding the Convention's non-applicability -- claimed that its actions conformed to the Convention.⁴²⁰ And, despite disagreeing with the ICJ as to whether it was

⁴¹⁶ See Ruth Lapidoth, *The Status of the Territories: The Advisory Opinion and the Jewish Settlements*, 38 ISR. L. REV. 292, 293 (2005) ("discussion of the legality of the settlements was not necessary, and thus is only an *obiter dictum*").

⁴¹⁷ ICJ Wall opinion, *supra* note 414, declaration of Judge Buergenthal at 1.

⁴¹⁸ *Id.* at 4.

⁴¹⁹ Concurring opinion in the *Elon Moreh* case, SHAMGAR, *supra* 219, at 438. It is pertinent to note that Judge Witkon thought the Geneva Convention did apply to Israel's hold on the West Bank, unlike the view expressed by Justice Landau that the Geneva Convention "belongs to conventional international law which does not legally bind an Israeli court..." *Id.* at 419.

⁴²⁰ Most recently, this "construct" was articulated in Mara'abe v. The Prime Minister of Israel, HCJ 7957/04, (Sept. 15, 2005), <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html>: "The Judea and Samaria areas are held by the State of Israel in belligerent occupation. The long arm of the state in the area is the military commander. He is not the sovereign in the territory held in belligerent occupation (see The Beit Sourik Case, *supra* note 420, at p. 832). His power is granted him by public international law regarding belligerent occupation. The legal meaning of this view is twofold: first, Israeli law does not apply in these areas. They have not been "annexed" to Israel. Second, the legal regime which applies in these areas is determined by public international law regarding belligerent occupation ... In the center of this

legal for an occupying power to construct a security fence in occupied territory in order to protect its own citizens from terrorism, even if those citizens were settlers,⁴²¹ the Court has required the government to change the shape and scope of the fence to take greater account of the interests of Palestinians affected by it.⁴²² In these and other more recent opinions, the

public international law stand the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.... These regulations are a reflection of customary international law. The law of belligerent occupation is also laid out in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.... The State of Israel has declared that it practices the humanitarian parts of this convention. In light of that declaration on the part of the government of Israel, we see no need to reexamine the government's position. We are aware that the Advisory Opinion of the International Court of Justice determined that *The Fourth Geneva Convention* applies in the Judea and Samaria area, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions. As mentioned, seeing as the government of Israel accepts that the humanitarian aspects of *The Fourth Geneva Convention* apply in the area, we are not of the opinion that we must take a stand on that issue in the petition before us. In addition to those two sources of international law, there is a third source of law which applies to the State of Israel's belligerent occupation. That third source is the basic principles of Israeli administrative law, which is law regarding the use of a public official's governing power. These principles include, *inter alia*, rules of substantive and procedural fairness, the duty to act reasonably, and rules of proportionality. " *Id.* at 8-9.

⁴²¹ *Maar'abe v. The Prime Minister of Israel*, *supra* note 420. The Mara'abe case dealt with a petition by residents of several Palestinian villages that were separated from the remainder of the West Bank by the placement of Israel's security fence to protect Alfei Menashe, an Israeli settlement in the West Bank, 4 kilometers beyond the Green Line. The Court's opinion, by its President, Aharon Barak, was written in the aftermath of the International Court of Justice's advisory opinion about the security fence, see notes 412-18 and accompanying text, and was as much a response to the ICJ opinion as it was an adjudication of the rights of the villages affected (although it did order the military "within a reasonable period, to reconsider the various alternatives for the separation fence route at Alfei Menashe, while meaning security alternatives which injure the fabric of life of the residents of the villages of the enclave to a lesser extent.") *Id.* at p. 63.

⁴²² One of these cases, HJC 2056/04 *Bet Sourik Village Council v. The Government of Israel* [2005] , 58(5) P.D. 807 (hereinafter, the Bet Sourik Case), occurred prior to the ICJ opinion, while the *Maar'abe* case was decided subsequently. Writing for the court in the Beit Sourik case, President Barak also laid out the test of proportionality that, according to the Court, inheres in both international humanitarian law and Israeli municipal law: "[a]ccording to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize the governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is being attempted, and the means used to achieve it." Barak then laid out the subtests, all of which must be satisfied, if proportionality is to be satisfied: "The first subtest is that the objective must be related to the means. ... According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the "least injurious means" test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means."

<http://elyon1.court.gov.il/eng/verdict/framesetSrCh.html>. In *Beit Sourik* itself, the Court was convinced that the first two sub-tests of the proportionality test were satisfied but not the third in a majority of the instances to which the decision related and ordered the government and military to change the placement of the fence in the objectionable areas. Similarly, in *Maar'abe*, *supra* note 420, although the Court disagreed with the ICJ – both as to the question of whether the safety of Israel's own citizens could be taken into account with respect to the placement of the fence (*Id.* at 13) and the question of whether more generally international law forbade the construction of the fence in occupied territory -- the Court did find particular segments of the fence to have failed the proportionality test, especially the third sub-test part of it. *Id.* at 63. This trend has continued. In another recent case, the Court has also required the Israeli government to reconfigure the security fence on grounds of hardship to Palestinian residents or of

Court has seemed less certain that its basis for adjudging Israeli actions on the West Bank according to the 4th Geneva Convention depends solely upon the government's own claim of adherence to the Convention's humanitarian provisions.⁴²³ As David Kretzmer, a prominent critic of settlements, has acknowledged, "[i]n the last few years the Court has handed down a number of courageous decisions, supportive of human rights."⁴²⁴ Yet, despite this record of attentiveness to Palestinian interests and of decisions that have actually restricted governmental and/or military actions *vis' a vis* the Palestinians,⁴²⁵ the Court has never held that Israeli settlements, *per se*, violate international law.⁴²⁶

separation of Palestinians from their agricultural lands. See, e.g., Yuval Yoaz, *High Court: State Must Explain why it Won't Move Separation Fence in Bil'in*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/678112.html> (last updated Feb. 2, 2006). In another case, the court has enjoined building the security fence around illegal outposts. See Yuval Yoaz, *High Court Forbids Building Fence Round Illegal Avnei Hefetz Outpost*, HAARETZ, <http://www.haaretz.com/hasen/spages/664913.html> (updated Jan. 2, 2006). In general, the Israeli Supreme Court has been regarded as one of the most impartial judiciaries in the world and seen as highly protective of the rights of Palestinians. See D. Beinisch, "The Role of the Supreme Court of Israel in Times of Emergency", *Globes*, November 21, 2002 and DERSHOWITZ, ISRAEL, *supra* note 39 at 183-7. Indeed, the Israeli Supreme Court, particularly under its present President, Aharon Barak, has been criticized precisely for its judgments allegedly adverse to Israeli settlers and security. See Caroline Glick, *Column One: Israel's Judicial Tyranny*, Nov. 18, 2005, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1132053877195&pagename=JPost%2FJPArticle%2FShowFull>.

⁴²³ For example, in the *Mara'abe* case, *supra* note 420, President Barak's opinion for the Court termed the basic normative foundation of both the ICJ opinion on the security fence and its own to be "a common one." Specifically, in regard to the 4th Geneva Convention, it articulated that commonality of normative foundation in the following subtle way:

"The ICJ held that in an occupied territory, the occupier state must act according to *The Hague Regulations* and *The Fourth Geneva Convention*. That too was the assumption of the Court in *The Beit Sourik Case*, although the question of the force of *The Fourth Geneva Convention* was not decided, in light of the State's declaration that it shall act in accordance with the humanitarian part of that convention. The ICJ determined that in addition to the humanitarian law, the conventions on human rights apply in the occupied territory. This question did not arise in *The Beit Sourik Case*. For the purposes of our judgment in this case, we assume that these conventions indeed apply."

Id. at 36

⁴²⁴ KRETZMER, *supra* note 204, at 14.

⁴²⁵ David Kretzmer, writing approximately five years ago, noted: "In the last few years the Court has ... handed down a number of courageous decisions, supportive of human rights. Foremost among these are decisions forbidding the security services from using any form of physical force in interrogation of terrorist suspects, denying the authorities the power to use the law on administrative detention to hold detainees as 'bargaining chips,' and deeming unlawful restrictions on Arabs purchasing houses in a communal settlement established on state land by the Jewish Agency." KRETZMER, *supra* note 204, at 14-15 (citations omitted). A recent example is a case in which the Israeli Supreme Court, sitting as the High Court of Justice, rebuked the municipality of Jerusalem for not having created enough classrooms for the Arabs of East Jerusalem and requiring the Jerusalem municipality and Israel's Department of Education to draft a plan to do so within five months. See Ketsena Svetlova, *HCI rebukes Municipality, Education Ministry over Education in e. Jerusalem*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1132475619858&pagename=JPost%2FJPArticle%2FShowFull> (updated Nov. 30, 2005). See also Y. Yoaz, *High Court Bans IDF's 'Early-Warning Practice*, HAARETZ, Oct. 10, 2005, www.haaretz.com/hasen/objectw/pages/PrintArticleEn.jhtml?itemNo=632657.

In accord with the ICJ's opinion and the Security Council resolutions in 1979-80 to which the ICJ referred, the General Assembly has repeatedly passed resolutions stating that Israeli settlements violate Article 49's sixth paragraph.⁴²⁷ The Security Council issued three such resolutions during 1979 and 1980.⁴²⁸ However, finding references to the application of Article 49's sixth paragraph to the actions of any nation except Israel is like looking for "needles in a haystack." A number of indictments and decisions by the International Criminal Tribunal for the Former Yugoslavia that have considered acts of genocide and forced deportations, primarily those committed by Serbs against Bosnian Muslims,⁴²⁹ and a decision on a motion for acquittal by the International Criminal Tribunal for Rwanda⁴³⁰ deal with, or are based upon, a violation of Article 49, along with other provisions from the four Geneva Conventions. However, all references with respect to the Article 49 of the 4th Geneva Convention seem to pertain to its first and second paragraphs rather than to its sixth. Finally, occasionally one finds a non-governmental reference to Article 49 applying to the conduct of a nation

Although acknowledging and applauding this activism, however, Kretzmer seems partially to agree with the view that the Supreme Court has legitimated the actions of Israel on the West Bank "[b]y clothing acts of military authorities in a cloak of legality ..." KRETCHMER, *supra* note 204, at 2. On the other hand, he concedes that court questioning and pressure have caused the military and government to back down from decisions or acts under consideration: "when the overall picture is considered, the conclusion is far less clear [that the Court's legitimating function has dominated], since the Court's shadow has played a significant role in restraining the authorities." *Id.* at 190.

⁴²⁶ David Kretzmer suggests that the doctrine of "justiciability" still plays a role, the court accepting the justiciability of individual claims brought by Palestinians on the basis of their property or other rights but deeming the general policy of settlements not justiciable. For a case that support's Kretzmer's suggestion, see *Bargil v. Government of Israel*, *supra* note 224. In other words, the Court's silence on this issue does not necessarily mean that it concurs with the government that the settlements do not violate international law. And in the *Mara-be* case, *supra* note 420, the Court was able to avoid an opinion as to whether the settlements themselves violate international law because it determined that the responsibility of the Israeli military administration under the Hague Regulations included not only the safety and security of the Palestinians on the West Bank but Israeli civilians as well (that is, the duty of protection did not depend upon the legality of the presence of the settlers there). See *id.* at 13-14.

⁴²⁷ See *supra*, note 12.

⁴²⁸ S.C. Res. 452, U.N. Doc. S/RES/452 (July 20, 1979); S.C. Res. 465, U.N. Doc. S/RES/465 (March 1, 1980); S.C. Res. 478, U.N. Doc. S/RES/478 (Aug. 20, 1980), http://www.un.org/Docs/sc/unsc_resolutions.html. The date of these resolutions, which were adopted during the Carter administration, is significant. While the United States State Department, during the Carter and George H.W. Bush administrations, did consider the settlements illegal, the State Department subsequently declined to reiterate that position. The Reagan, Clinton and George W. Bush administrations have adopted the more frequent formulation that the settlements simply are an obstacle to peace.

⁴²⁹ See, e.g., *Prosecutor v. Vidoje Blagojevic, Dragan Jokic*, 2005 WL 414846 (UN ICT)(Trial)(Yug)); *Prosecutor v. Tihomir Blaskic* 2004 WL 2781930 (UN ICT (App)(Yug)). For a description of the horrific events on account of which these prosecutions were brought, see TONY JUDT, *POSTWAR, A HISTORY OF EUROPE SINCE 1945* 665-83 (2005).

⁴³⁰ *The Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali* (Case No. ICTR-87-21-T), *Sylvain Nsabimana and Aphonse Ntezirayo* (Case No. ICTR-97-29A-T), *Joseph Kanyabashi* (Case No. ICTR-96-8-T), *Joint Case No. ICTR-98-42-T*, 2004 WL 3154919 (UN ICT (Trial)(Rwa)).

other than Israel – for example, in 1994, a non-governmental organization alleged that Article 49(6) was violated in the Chinese transfer of its population into Tibet in order to alter the population mix in Tibet.⁴³¹

Caution in facilely concluding that Israeli settlements violate Article 49(6) comes from respect for, rather than disregard of international humanitarian law. Although elementary, it merits repetition that what distinguishes a system of “law” from arbitrary systems of control is that similar situations are handled alike. No legal system is one hundred percent pure, of course, but the incompletely achieved goal remains that legal principles are applied based upon the circumstances regardless of the political position or identity of the parties. The very loose use of international law, disproportionately applied to every instance of Israel trying to protect itself undermines the notion that this is “law” entitled to authoritative weight in the first place.⁴³² Where are the legal proceedings and/or repeated United Nations General Assembly and Security Council resolutions condemning and applying Article 49’s sixth paragraph to the forced displacement of Tibetans by Chinese, the movement of Russians into the Baltic States or other post-1949 transfers in Africa, Asia and Central Europe?

Where warranted, of course, Israel should not be immune to the charge that it has violated the 4th Geneva Convention. But others have cited the irony of applying the Geneva Convention, drafted and adopted in the aftermath of World War II, with the Holocaust specifically in mind, *uniquely* to that state a significant percentage of whose population consists either of Holocaust survivors, their offspring, or other relatives of those who perished

⁴³¹ International Association of Educators for World Peace, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories*, submitted to the UN Economic and Social Council, E/CN.4/1994/NGO/29 (Feb. 10, 1994). The International Commission of Jurists wrote two reports dealing with Tibet in 1959 and 1960, reporting “genocide”, but neither one seemed to be based upon Article 49(6) of the Geneva convention. See ICJ, *The Questions of Tibet, The Rule of Law* (Geneva 1959) (excerpts); ICJ, *Report on Tibet and the Chinese Peoples Republic* (Geneva 1960) (excerpts), <http://www.tibet.com/Resolution/index.html> (last viewed Feb. 9, 2006)). As Alan Gerson has pointed out, “The General Assembly limited its response to mild censure and the Security Council was never convened.” GERSON, *supra* note 160, at 19. After the Republic of China assumed the United Nations post formerly held by the Republic of China (Taiwan), no subsequent resolutions were ever passed.

⁴³² This point is made most emphatically in Micha Pomerance, *the ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT. L. 26, 36 (2005): “Since advisory opinions are inherently nonbinding--and do not gain in legal force when endorsed by the General Assembly or even the Security Council --their authoritativeness depends, naturally, on the persuasiveness of their reasoning. To rise above the level of political discourse and be considered judicial utterances worthy of respect in state practice, they must be seen as thorough and balanced in the presentation of facts and law, fair to the contending interests involved, and internally consistent. Mere *ipse dixits* obviously cannot substitute for careful judicial explication of the process by which conclusions were reached.”

in the Holocaust.⁴³³ On the part of some, the implied equation of Israeli actions with those of the Nazis forms part of a strategy to demonize and deny legitimacy to Israel, not simply its settlements on the West Bank or particular Israeli policies.⁴³⁴ As one legal commentator writing in 2003 noted, “In three recent emergency special sessions of the UN General Assembly, Israeli settlement was cited as a violation of the 1949 Fourth Geneva Convention. These international humanitarian instruments, forged in the ashes of the Holocaust to prevent future genocidal brutality and oppression, were never invoked in 50 years until the case of condominium construction in Jerusalem during 1998.”⁴³⁵ Similarly, would it not be ironic if the only applications of the equal protection clause in the Fourteenth Amendment were against the interests of African Americans when that amendment, like the 13th amendment, was passed in the aftermath of and directed towards the end of slavery and its consequences in America?

4. Some concluding remarks about the applicability and weight to be assigned to the condition of legality under international law

In sum, the question of whether, as a general matter, Israeli settlements violate either the various provisions of the Hague Regulations and/or Article 49(6) of the Geneva Convention is reasonably moot. One should be cautious about overstating the position of either settlement proponents or opponents.

Many of those who allege a violation of international law acknowledge, indeed try to point out, a distinction between settlements established in the late 1960's until at least 1977, when the Labor led government basically followed the Allon plan, and those established in subsequent years under Likud led governments.⁴³⁶ Many if not most of the settlements established under the Allon plan were placed in the Jordan

⁴³³ See Curtis, *supra* note 110, at 486: “It is ironic that this charge [that Israel has violated the Geneva Convention] should be made in reference to a convention the purpose of which was to prevent the recurrence of Nazi-like occupation with its brutality, disregard of human rights, physical and mental coercion, taking of hostages, and imposition of foreign law.”

⁴³⁴ See Bradley Burston, *What Makes Islam so Easy to Hate?*, HAARETZ, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=676507&contrassID=2> (last updated Jan. 30, 2006) (“The Code is clear, and it is communicated to a billion Muslims the world over – these Jews, these are the Nazis now.”); Francis A. Boyle, *Israel's Crimes against Palestinians: War Crimes, Crimes Against Humanity, Genocide*, MEDIA MONITORS NETWORK, Aug. 28, 2001, available at <http://www.mediamonitors.net/francis7.html>. Boyle served as Legal Adviser to the PLO from 1991 to 1993.

⁴³⁵ See J. Helmreich, *Diplomatic and Legal Aspects of the Settlement Issue*, 2 JERUSALEM ISSUE BRIEF, No.16 (Jan. 19, 2003).

⁴³⁶ Lein, *supra* note 29, at 11-15.

Valley, away from Palestinian population centers, and, wherever placed, had a military defense justification. These settlements, then, at least initially qualified under the “military necessity” standard of the Hague Regulations and hardly affected the Palestinian civilian population.⁴³⁷ Under later Likud led governments, many if not most settlements were demanded if not forced upon the government by *Gush Emunim* and similar settlement groups. As to the great bulk of these settlements, there is little doubt that almost all settlers were enthusiastic volunteers, who, irrespective of any Israeli tax incentives or other help, would nonetheless have established their settlements. As *B’Tselem* itself has stated, “The principal method adopted by the [*Gush Emunim*] movement was to settle a given site without government permission – and sometimes contrary to its policy – in an effort to force the government later to recognize the settlement as an accomplished fact.”⁴³⁸ Hence, the argument that Israel, as an “occupying power”, had “transferred” them in violation of the Article 49(6) of the 4th Geneva Convention becomes very weak. Similarly, since most Israeli settlements have been established on state rather than private land, the charge that all settlements have been established on “Arab” land should meet with substantial skepticism unless material errors either in the substance or procedure of designating land as “state” land is established.

On the other hand, one should also exercise caution about overstating Israel’s position. When both the Hague Regulations and 4th Geneva Convention are viewed together, there is a sense that Israeli arguments justifying West Bank settlements under one body of law weaken its arguments under the other body. The more one justifies settlements in the West Bank under a doctrine of “military necessity” as a reason to depart from the *status quo ante* prior to June, 1967 (in order to satisfy the Hague Regulations), the more that justification seems incongruous with seemingly permanent civilian settlements. Stated inversely, the more one emphasizes that the settlers have moved to the West Bank of their own accord rather than at the instance of the Israeli government or its military (in response to the charge that an occupying power has transferred its civilians into occupied territory in violation of Article 49(6) of the Geneva Convention), the more difficult it is to support the justification of “military necessity” under the Hague Regulations for alterations in the West Bank allegedly prejudicial to the native population, including the settlements. Similarly, even if the settlers are present legally because of military necessity, that

⁴³⁷ Even *B’Tselem* concedes that, at least when initially established as military bases, the settlements did not violate international law. *See id.*, at 40.

⁴³⁸ *Lein, id.*, at 13.

would not give them the right to remain in a Palestinian state any more than Israel's soldiers present on the West Bank would have a right to remain. While there may be answers to these difficulties that are given in the text of this article – including the Blum/Rostow/Stone opinion that Israel's status on the West Bank cannot be defined solely as that of an occupying power, the removal of seemingly “permanent” settlements from the Gaza Strip (demonstrating that even the notion of permanence is ephemeral), the fact that international law related to occupation was never formulated with reference to control over a territory lasting this long without final peace agreements, the absurdity of interpreting international law so as to bar Jews from voluntarily living in an area, etc., etc. – the point is that, just like the frequently reiterated statement that Israeli settlements clearly violate international law, the question of legality is not a “slam dunk” on Israel's part either.

Nonetheless, international law should not be used solely as an instrument of politics. To the extent that it is so used, its legitimacy as a source of law materially suffers, as illustrated by the pointed critiques that followed the ICJ's advisory opinion on the fence.⁴³⁹ Given the paradoxes of

⁴³⁹ See, e.g., Pomerance, *supra* note 432; Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ*, 99 AM.J.INT.L. 62 (2005); Gerald M. Steinberg, *The UN, The ICJ and The Separation Barrier: War by Other Means*, 38 ISR. L. REV. 335 (2005); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security “Fence and the Limited of Self Defence*, 99 AM. J. INT. L. 52 (2005). Wedgwood even reports that “following the rendering of the Court's judgment, foreign ministry legal advisers from varied countries privately conveyed dismay at the opinion.” *Id.* at 57. The one-sided nature of the facts accepted as the basis for the International Court of Justice's decision, the cursory nature of its handling of legal materials, and the its problematic position that military necessity does not include protection against terrorism emanating from occupied territory contrast unfavorably with the measured way that the Israeli Supreme Court decided the same questions by applying its proportionality test in the *Sourik* and *Mara'be* cases. See *supra* note 422. Even David Kretzmer criticized the superficial analysis offered by the ICJ: “International mechanisms for ensuring compliance with norms of IHL (International Humanitarian Law) have always been extremely weak. It is essential that they be strengthened. A major step in this direction has been taken with the establishment of the International Criminal Court. Nevertheless, while this step has been welcomed by many, some experts and a few states, foremost among which are the United States and Israel, remain skeptical. Their skepticism is mainly grounded in the fear that the ICC's decisions will be dictated by politics rather than by law. In this atmosphere the credibility of international judicial organs involved in assessing compliance with IHL becomes more important than ever. This credibility rests largely on the professionalism of such organs and the soundness in law of their opinions. When looked at from this point of view, an opinion whose findings “are not legally well-founded” is hard to applaud.” Kretzmer, *supra* note 331, at 102. While several international law scholars applauded the ICJ opinion, most particularly Richard Falk, (see Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AM. J. INT'L L. 42 (2005), at least Falk's reaction could be anticipated in light of his unrelenting opposition to Israel and substantially all its policies over many decades. See, e.g., Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991) (defending the intifada with a one-sided view of Israeli policies on the West Bank); UN Commission on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the Human Rights Inquiry Commission, UN Doc.

applying the international law of occupation, especially Article 49(6) of the 4th Geneva Convention, which has uniquely and increasingly been the thrust of the charge of illegality, to Jewish settlements on the West Bank – a reality for millennia prior to the Twentieth Century and a right established in the Balfour declaration and the Palestine Mandate-- it is questionable at best to conclude that Jewish settlements *in general* violate international law. Stating the condition initially posed in the negative – that Israeli settlements are not demonstrated to be illegal -- the condition seems to have been satisfied. This conclusion, of course, may not hold as to *particular* civilian settlements that, without military necessity, have been established on requisitioned land, civilian settlements established on private Palestinian land subsequent to Elon Moreh, or settlements established on land fraudulently purchased and/or fraudulently designated as state land. While international law cannot be the ultimate arbiter of whether settlements remain, it can influence the decision with respect to particular settlements.

The Oslo accords⁴⁴⁰ signed between Israel and the Palestine Liberation Organization in September of 1993 specifically left the subject of Israeli settlements, like the subjects of Jerusalem and refugees, to the political process of negotiation.⁴⁴¹ The 1995 interim agreement between Israel and the Palestinian Authority similarly designated settlements and borders as subjects to be negotiated in final status negotiations between the parties.⁴⁴² It is the conditions based upon predominantly and transparently political, social and security considerations – namely, that continuance of Jewish settlements is both practical and consistent with the creation of a viable Palestinian state – that will and should determine their fate in general.

E/CN.4/2000/121, ¶¶35-44, Report on

<http://daccessdds.un.org/doc/UNDOC/GEN/G01/118/72/PDF/G0111872.pdf?OpenElement> (Falk was one of the three authors of a report taking the position that Israel could not exercise the rights of an *occupation bellico* on the theory that its conflict in the West Bank was a not an international conflict.).

⁴⁴⁰ Declaration of Principles on Interim Self-government Arrangements, September 13, 1993,

<http://www.israel-mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm> (last viewed Jan. 20, 2006).

⁴⁴¹ *Id.* Article V, ¶3 provided that negotiations would cover the remaining issues, including: “Jerusalem, refugees, *settlements*, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.”; *id.*, Annex II (Protocol on withdrawal of Israeli Forces from the Gaza Strip and Jericho Area), ¶3.b. specifically excepted from “Structure, powers and responsibilities of the Palestinian authority” “external security, *settlements*, Israelis, foreign relations...” And, the agreed minutes to the Accords provides that the jurisdiction of the Palestinian council to be created “will cover west Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations: Jerusalem, *settlements*, military locations, and Israelis.” *Id.*, Agreed Minutes to the Declaration of Principles on Interim Self-government Arrangements, ¶ B.

⁴⁴² See The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Article XXXI, ¶5 (Sep. 28, 1995), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm> (last viewed Jan. 21, 2006).

B. That Israeli Jewish settlements not prevent the creation of an independent Palestinian state necessary for a two-state solution

Except for partisans who tend to use legal arguments to score political points, legitimate political issues dominate over legal issues when speaking about Jewish settlements. It is to these political issues that we now turn. The first, again heard repeatedly, is that Israeli settlements prevent the establishment of a Palestinian state. The political argument would seem to have two dimensions, one geographical and the other directed towards peoplehood or citizenship.

The most frequently heard version of this political argument is geographical. The strong form version of the geographical argument is that Israeli settlements prevent a contiguous Palestinian state.⁴⁴³ A moderate-form version of the geographical argument is that, whether or not, Gaza aside, such a state would have contiguity, its borders would be extraordinarily convoluted. A correlative claim connected to both versions is that the settlements, in any event, occupy too much of the land that Palestinians would need for their state.

It is difficult to understand the strong form version because, even if Israel were to retain sovereignty over every existing Jewish settlement on the West Bank, it would be Israel, not a state of Palestine, that would lack contiguity. And, as previously discussed in this article, while the moderate version has some validity in the abstract, much of its force is undermined when we remind ourselves that we are speaking about an allocation of land west of the Jordan River between two independent states. But, the irony of both of these geographical concerns is that they do not apply to the argument made in the article. Acceptance of the fact that Israeli Jewish settlements can exist in an Palestinian state would only serve to increase the contiguity and/or geographical wholeness of that state.⁴⁴⁴

Connected to both the “strong” and “moderate” geographical argument is an assumption, seemingly held by the popular press and much of the public, that Israeli settlements constitute a substantial percentage of the land mass of the West Bank. Ironically, Peace Now and *B’Tselem*, both of which oppose the settlements, estimate the percentage of land mass

⁴⁴³ See Editorial, *Bush, Abbas Intentions*, BOSTON GLOBE, Oct. 21, 2005 at A16 (“Palestinians perceive continued thickening of settlements as proof that Israel has no intention of allowing a viable Palestinian state on land that is not divided into multiple separate enclaves.”).

⁴⁴⁴ See *supra*, notes 117-26 and accompanying text.

settlements presently occupy on the West Bank at 1.36 percent and 1.7 percent, respectively.⁴⁴⁵ To the extent that population clusters of Arabs and Jews should and will influence the borders between Israel and a state of Palestine, at least some of the settlements will be integrated into Israel, probably in exchange for land in the Negev that would broaden the width of Gaza. And, if so, the percentage of land on the West Bank that settlements constitute would drop even further, arguably well below 1 percent. These percentages rise appreciably, to somewhere between 3 and 6 percent of the West Bank, if connecting roads and the like are considered.⁴⁴⁶ But, once again, these percentages can only drop if the issue under consideration is not whether the settlements will stay, but under whose jurisdiction they will remain.

The heart of the matter concerns the presence of a population within Palestine that identifies as Israeli Jews. In contrast to the nearly 20 percent of Israel's own population that is Palestinian Arab, however, the 50,000 to 100,000 Jewish settlers that will probably be most affected by continuance of Jewish settlements in a Palestinian state would constitute less than three percent of Palestine's population, based upon a present population of approximately 2.3 to 2.5 million Palestinian Arabs within the West Bank and Gaza,⁴⁴⁷ and substantially less than 2 percent of such a state if one assumes some influx of Palestinian refugees into such a state. Whereas, in the words of Ephraim Karsh, "it is certainly true ... that the influx of these [Palestinian] refugees into the Jewish State would irrevocably transform its demographic composition"⁴⁴⁸, the existence of Jewish communities within a Palestine would not pose any demographic risk to Palestine's remaining an overwhelmingly Arab state.

As with Israel's Arab population, the presence of Israeli Jews in a Palestinian state would pose issues of citizenship (will they be citizens of that state or only residents?), loyalty (will the settlers, regardless of whether they gain Palestinian citizenship, remain citizens of the State of Israel?), and legal autonomy in particular spheres. These are serious issues, but it is unclear why they pose more serious problems than those concerning the

⁴⁴⁵ See Helmreich, *supra* note 435.

⁴⁴⁶ This was reflected in Washington's proposal between July 2000 and the end of that year that Israel withdraw from 95 percent of the West Bank. See Morris, *Camp David and After*, *supra* note 58.

⁴⁴⁷ See Arnon Regular, *1.1m Palestinians Live in Local Councils Controlled by Hamas*, HAARETZ, <http://www.haaretz.com/hasen/spages/658955.html> (updated Dec. 18, 2005). If the Palestinian Authority's own population figures were used (see *supra* note 29), the Jewish percentage of the population Jews would be *de minimus*.

⁴⁴⁸ KARSH, *supra* note 37, at 166.

Arab population in Israel.⁴⁴⁹ Israel's Arabs – whether Muslim or Christian – exercise legal autonomy in personal affairs.⁴⁵⁰ A recent Israeli survey on patriotism in Israel and its bearing on national security found that “most of the Israeli Arabs are not proud of their citizenship (56 percent) and are not ready to fight to defend the state (73 percent).”⁴⁵¹ Moreover, the survey found differences “between the type and expression of patriotism among Jewish citizens ... and ... Arab citizens.” “Among the latter”, it was reported, “patriotic feeling is subdued” and “[w]hen patriotic sentiment is given expression, twice as many Arabs define themselves as Palestinian patriots than as Israeli patriots.”⁴⁵² After the creation of an independent Palestinian state, would not at least some of Israel's Arab citizens wish to become citizens of that state as well as citizens of Israel?⁴⁵³

Moreover, just as conceptions of sovereignty continue to evolve and change⁴⁵⁴, it is clear that citizenship, a concept related to one's degree of inclusiveness within a given sovereignty, bears different and evolving meanings. Summarizing a wealth of social scientific learning, Paul Schiff

⁴⁴⁹ For a brief review of the legal status of various minority populations within Israel, *See* HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 493-6 (2000). Nor is the question of autonomy for religious and ethnic minorities unique to Israel or to a future state of Palestine if Jewish settlements remain. *See id.* at 491-3. With respect to loyalty, various anecdotal evidence suggests that the problem of “dual loyalty” may be equally as applicable to Israeli Arabs as it would be for Palestinian Jews. *See, e.g.,* Jack Khoury & Nir Hasson, *Two Israeli Arab Dentists Admit Joining Hamas While in Romania*, HAARETZ, Oct. 23, 2005, www.haaretz.com/hasen/objects/pages/jhtml?itemNo=637317. It has been reported that “Arab MKs over the years have become more resolved and effective expressing Palestinian identity and the national Palestinian struggle.” Dan Rabinowitz, *The Peretz Challenge to Arab politics*, HAARETZ, Dec. 1, 2005, <http://www.haaretz.com/hasen/spages/652261.html>. *See also* Zvi Barel, *Absentee Journalism*, HAARETZ, <http://www.haaretz.com/hasen/spages/656078.html> (last updated December 11, 2005) (“Hebrew Jewish society ... is almost completely missing from the Arab press... Even worse, the leaders of Arab society take no interest in the way Israeli society is covered – or not covered – in the Arab press.”).

⁴⁵⁰ *See* Steiner, *supra* note 449.

⁴⁵¹ Uzi Arad and Gal Alon, *Patriotism and Israel's National Security – Herzliya Patriotism Survey 2006* (Lauder School of Government, Diplomacy and Strategy, Institute for Policy and Strategy, Jan. 19, 2006), <http://www.imra.org.il/story.php3> (last viewed Jan. 22, 2006). One commentator has addressed the nuances in this survey, including the fact that 77% of the Arabs view Israel as better than other countries. *See* Alexander Yacobson, *On Israeli-Arab Patriotism*, HAARETZ, <http://www.haaretz.com/hasen/spages/676221.html> (last updated Jan. 3, 2006).

⁴⁵² *Id.*

⁴⁵³ This is a very different question than the one Uzi Arad discusses. *See* Arad, *supra* note 63. In discussing and supporting land swaps, Arad admits that only one-third of Israeli Palestinians support a land swap that would make them residents and, presumably, citizens of Palestine rather than Israel (parenthetically, he also argues that this percentage would rise for a variety of reasons). But whether Palestinians who are citizens of Israel would like to give up their Israeli citizenship and become citizens of Palestine is a very different question of whether they would like to enjoy dual citizenship.

⁴⁵⁴ For discussions of this phenomenon, *see* STEPHEN D. KRASNER, *SOVEREIGNTY, ORGANIZED HYPOCRISY* (1999); AMOS SHAPIRA & MALA TABORY, *EDS., NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW* (1999); NEIL WALKER, *SOVEREIGNTY IN TRANSITION* (2003); and Lapidoth, *supra* note 185, at 318.

Berman demonstrates, “people can hold multiple, sometimes nonterritorial, community affiliations.”⁴⁵⁵ Traditional and allied notions of citizenship, sovereignty and the “nation-state” are fast eroding, with flexible and contingent forms of these notions replacing the more absolutist, formalistic notions associated with Europe post the Middle Ages. Significantly, under the Oslo Accords, Palestinians in East Jerusalem were allowed to vote in the Palestinian elections, although Israel claims all of Jerusalem as its capital under its jurisdiction.⁴⁵⁶

Millions of Americans, to consider another example, hold dual citizenship, retaining their American citizenship even as they live in Ireland, Poland, Israel, Mexico or some other place and also exercise citizenship or some attributes we associate with citizenship in these other places. Why would dual citizenship necessarily be more problematic in the context of two contiguous states? And what if the Jewish population, or large numbers of it, chose not to become citizens of Palestine? Again, by way of analogy, approximately 6.6 percent of legal residents in the United States are not citizens.⁴⁵⁷ Provided that they are legally residing within the United States, these residents enjoy many of the same rights as American citizens, the most notable exception being the right to vote. Arguably, it is optimal to have all persons permanently resident within a given territory enjoy all the rights and experience all the obligations of others, but this utopian ideal rarely characterizes the situation of any present country, especially multi-ethnic nations that also attract immigrants.

Moreover, substantially all *peace* plans that have been proposed that incorporate a two-state solution, with one of those states being an Israel that can realistically be denominated and remain both a democratic and predominantly Jewish state, also posit that any Palestinian state to be created alongside Israel would be *demilitarized*.⁴⁵⁸ Without an army, some of the complications that Israel experiences with its Arab population⁴⁵⁹ disappear.

⁴⁵⁵ See Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005). See also Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 472-90 (2002). Although Berman directs his attention to jurisdictional questions, his analysis is applicable to juridical questions more broadly.

⁴⁵⁶ For a discussion of the difficulties Israel faced in reconciling a vote by Jerusalem’s Palestinian population with the reality that Hamas was on the ballot, see Aluf Benn, *State Seeks Solution for E. J’lem Voters in PLC Elections*, HAARETZ, <http://www.haaretz.com/hasen/spages/663125.html> (updated Dec. 28, 2005).

⁴⁵⁷ CensusScope, *United States Nativity and Citizenship, 1990-2000*, http://www.censusscope.org/us/chart_nativity.html (year 2000 estimate based upon a total population of 281.4 million and a non-naturalized foreign population of 18.6 million).

⁴⁵⁸ The usual phrase used in the negotiations was, “nonmilitarized state.” See ROSS, *supra* note 58, at 720.

⁴⁵⁹ Generally, Israeli Palestinian Arabs do not serve in the Israeli Army, while Israeli Druze and Bedhouin do. The Israeli justification for this has been that it would be unseemly for Israel to require Palestinians to

Issues of taxation, juridical status for purposes of legal proceedings, and voting are no more intractable in the context of a peace agreement and accompanying treaties than the comparable issues with respect to Palestinians residing within the state of Israel as citizens or entering Israel for employment on a daily basis.

C. That Continuance is practical: the issue of whether Jews and Arabs can co-exist safely within a predominantly Arab Palestine

The argument that Jewish settlements are an obstacle to peace frequently devolves to questions related to the willingness and safety of Jews and Arabs to co-exist in a Palestinian state. Sometimes this view is expressed in terms of “pragmatism”⁴⁶⁰, that is, although Jews should as a matter of principle be allowed to establish communities on the West Bank, pursuing the continuance option is not a pragmatic solution. The recent victory of Hamas in the Palestinian parliamentary elections has, if anything, heightened such concerns, although many pundits and academics have attributed the Palestinian vote more to the Palestinian Authority’s incompetence and inefficiency than to Hamas’ militant stance towards Israel and Jews.⁴⁶¹

Both Arabs and Jews have legitimate security and safety concerns. Palestinians have been witness to the destructive, anarchic acts of some Jewish settlers, who, originally armed for their self-protection, have stolen additional munitions from the Israeli military and turned their wrath both against the Israeli military and Palestinians. In several cases, they have killed Palestinians and in other cases beaten them, torched residences and/or stolen their olive crops.⁴⁶²

fight their Arab brethren. Whether or not this justification is convincing, the exclusion of Palestinian Arabs from military service has been criticized because a number of government benefits are based upon military service.

⁴⁶⁰ See Dershowitz, ISRAEL, *supra* note 39, at 176.

⁴⁶¹ See, e.g., Kary Liggett & Neil King Jr., *Hamas Victory Roils Middle East Peace Process*, WALL ST. J., Jan. 27, 2006, at 1; Fotini Christia & Sreemati Mitter, *Hamas at the Helm*, N.Y. TIMES, Jan. 27, 2006, at A23.

⁴⁶² Amira Hass, Jonathan Liss and Nadav Shragai, *Shin Bet: IDF did Nothing to Stop Settlers Uprooting Olive Trees*, HAARETZ, <http://www.haaretz.co.il/hasen/spages/668510.html> (last updated Jan. 10, 2006) (several human rights organizations allege 29 “harvest incidents” occurred between March 2005 and January 8, 2006, and that 773 olive trees were uprooted during the last 3 years; the Yesha Council of settlements allege that many of these incidents resulted either from the Palestinians pruning their trees or intentionally damaging them in order to receive compensation from the Israeli military). The recurrence of incidents, however, indicates that the great bulk of damage has been caused by settlers. For reports of these incidents, see, e.g., Ze’ev Schiff, *Anarchy on the Hilltops*, HAARETZ, Nov. 18, 2005, , <http://www.haaretz.com/hasen/spages/650475.html>; Arnon Regular & Eli Ashkenazi, *Palestinians:*

Jewish settlers also have good reason to fear for their safety.⁴⁶³ Sectarian hatred is a common phenomenon in the Middle East.⁴⁶⁴ Even Christian Palestinian Arabs have increasingly faced discrimination and physical violence from Muslims.⁴⁶⁵ Jews face even greater hostility. Sermons and speeches, broadcast on the official Palestinian Authority radio station, continually desecrate Jews and Judaism, calling them the children of pigs and monkeys, and implore Arab Muslims to kill all Jews and drive them from Palestine (a term that includes all of even pre-1967 Israel).⁴⁶⁶ Indeed,

Settlers Cut Down 200 Olive Trees near Nablus, HAARETZ, Nov. 27, 2005, <http://www.haaretz.com/hasen/spages/650475.html> (updated Nov. 27, 2005); David Forman, *Settlers, Hands off the Olive Trees*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?apage=2&cid=1134309653390&pagename=JPost%2FJPArticle%2FShowFull> (updated Dec. 27, 2005); Gideon Alon, *Shin Bet gives IDF, Police 'Harvest Incident' Suspects*, HAARETZ, <http://www.haaretz.com/hasen/spages/668680.html> (updated Jan. 11, 2006) (both describing an allegation that Jewish youths cut down olive trees in the Hebron area, and giving the statistic that there were 17 "harvest incidents" in 2005, including physical attacks on Palestinian harvesters, the theft of harvested olives, and trespassing); Amos Harel, *Hundreds of Settlers Riot in Hebron, Set Fire to Palestinian Home*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/670191.html> (last updated Jan. 15, 2006) (Israeli settlers, reacting violently to orders issued by the Israeli military to evacuate shops in Hebron, rioted, including torching a home belonging to Palestinians in the city); Amos Harel, *Settlers Riot across W. Bank Ahead of Amona Evacuation*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/676627.html> (last updated Jan. 31, 2006) (describing beatings of Arabs and torching of their cars, as well as violence by settlers against the Israeli Army in anticipation of the forced evacuation by the Army of an illegal settlement on the West Bank).

⁴⁶³ See Raphaeli Israeli, *The New muslim Anti-Semitism: Exploring Novel Avenues of Hatred*, JEWISH POLITICAL STUDIES REVIEW 17:3-4 (Fall 2005); Mortimer B. Zuckerman, *Abbas Must Act*, U.S. NEWS, www.usnews.com/usnews/opinion/articles/051031/31edit.htm; Glenn Kessler, *Palestinian Leader Is Urged To Confront Militant Groups*, WASH. POST, Oct. 21, 2005 at A14.

⁴⁶⁴ Witness the horrendous violence exhibited by Sunnis against Shiites, and visa versa, in Iraq. See Sabrina Tavernise, *Sectarian Hatred Pulls Apart Iraq's Mixed Towns*, N.Y. TIMES, Nov. 20, 2005, at 1.

⁴⁶⁵ See generally WEINER, *supra* note 83. Weiner ascribes much of this to the emergence of Islam as a political force, pointing out the draft constitution of the Palestinian Authority declares Islam to be the official religion and includes Sharia Law. Specifically, Weiner details the social and economic discrimination against Christians, the boycott and extortion of Christian businesses, violation of real property rights, crimes against Christian Arab women, Palestinian Authority Incitement against Christians, and the failure of the Palestinian security forces to protect Christians. One of his conclusions is that "[t]he reversion to traditional Muslim religious attitudes necessarily includes the treatment of Christians as second-class citizens or *dhimmi*." *Id.* at 22. In other words, Christians, as non-Muslims, face the same second class status that characterized minority communities in the Islamic Middle East for centuries, especially its Jewish communities.

⁴⁶⁶ See generally Itamar Marcus and Barbara Crook, *Kill a Jew – Go to Heaven: The Perception of the Jew in Palestinian Society*, JEWISH POLITICAL STUDIES REVIEW 17:3-4 (Fall 2005), reprinted at <http://www.jcpa.org/phases/phases-marcus-crook-f05.htm>. The authors write:

"The Palestinian religious, academic, and political elites teach an ideology of virulent hatred of Jews. The killing of Jews is presented both as a religious obligation and as necessary self-defense for all humankind. Palestinian Authority elites have built a three-stage case against Jewish existence, much as a prosecutor might build a case demanding a death sentence. As their expert witness, they bring Allah Himself, Who is said to have sent a message through the Prophet Muhammad that killing Jews is a necessary step to bring Resurrection. Stage 1 is characterized by collective labeling of Jews as the enemies of Allah, possessing an inherently evil nature. Stage 2 teaches that because of their immutable traits, Jews represent an existential danger to all humanity. Stage 3 presents the necessary solution predetermined by Allah: the annihilation of Jews as legitimate self-defense and a service to God and man."

during Ramadan, during the past several years, serial dramas based upon the Czarist produced forgery, *Protocols of the Elders of Zion*, have been broadcast on Arab television, including on stations under the control of the Palestinian Authority and stations in Egypt (with whom Israel has a peace treaty) and Syria.⁴⁶⁷ Very recently, the President Mahmoud Ahmadinejad, the president of Iran, pronounced that “Israel must be wiped off the map.”⁴⁶⁸ Iran sponsors both Hezbollah, which fights Israel from Southern Lebanon, and Islamic Jihad, which, operating both out of Gaza and the West Bank, engages in terrorism against Israeli civilians, both within the 1948 borders and on the West Bank; neither of these two groups accept the legitimacy of Israel.⁴⁶⁹ And even after the Israeli withdrawal from Gaza, scores of terrorist incidents have been attempted, and a few have succeeded.⁴⁷⁰ In the immediate aftermath of the Palestinian elections won by Hamas, the Hamas leadership seemingly remains committed to that organization’s retention of its guns – even perhaps under the legitimacy of forming a Palestinian “army” – and to the legitimacy of specifically targeting civilians.⁴⁷¹

Yet important voices of moderation do exist, accepting the legitimacy of Jews living within the midst of a greater Arab population.⁴⁷² And

See also Justus Reid Weiner & Michael Sussman, *Will the Next Generation of Palestinians Make Peace with Israel?*, JERUSALEM CENTER FOR PUBLIC AFFAIRS, Dec. 1, 2005, <http://www.jcpa.org/jl/vp537.htm> (“The idea of the *shahid* (martyr) has become so ingrained in Palestinian culture that it is a major theme in formal education, family values, religious practices, television broadcasting, posters, pre-suicide eulogies, trading cards, family celebrations, movies, music, games, and summer camps.”).

⁴⁶⁷ For a description of these shows, see <http://www.pmw.org.il/Protocols.htm> (Itamar Marcus, ed., Jan. 25, 2001 – Nov. 26, 2002). See also *Tamadan TV Special: The Protocols of the Elders of Zion*, MEMRI, Special Dispatch Series – No. 309, Dec. 6, 2001, available at <http://www.memri.org/bin/articles.cgi?Area=sd&ID=SP30901>.

⁴⁶⁸ See M. Indyck, *Iran’s Bluster Isn’t a Bluff*, L.A. TIMES, Nov. 1, 2005, <http://www.latimes.com/news/opinion/commentary/la-oe-indyk1nov01.0.4655814.print.story?coll=la-news-comment-opinions>. Indyck, director of the Saban Center for Middle East Policy at the Brookings Institution, is a former U.S. ambassador to Israel and assistant secretary of State for Near East affairs.

⁴⁶⁹ See *id.*.

⁴⁷⁰ For example, on October 26, 2005, a Palestinian suicide bomber killed five Israelis in the town of Hadera. See Greg Myre and Dina Kraft, *Palestinian Suicide Bomber Kills 5 in an Israeli Town*, N.Y. TIMES, Oct. 27, 2005, at A3.

⁴⁷¹ See Meshal, *Hamas Ready to Merge Armed Factions to form PA Army*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/675793.html> (updated Jan. 28, 2006); Steven Erlanger, *Hamas Leader Sees No Change Toward Israelis*, N.Y. TIMES, Jan. 26, 2006, at 1; Reuters, *Hamas says it won’t arrest militants who attack Israel*, HAARETZ, Mar. 23, 2006, <http://www.haaretz.com/hasen/spages/697914.html>; Bernard Gwertzman, *Levitt: Hamas Unlikely to Moderate Stance Now That It Controls Palestinian Government*, Mar. 20, 2006, <http://www.cfr.org/publication/10189/levitt.html>. See also Jonathan Adiri, *From Mahmoud Abbas to Mahmoud Hamas, Israel has no Alternative but to Disengage from the Palestinians and to Manage the Conflict from a more Secure Position*, Feb. 19, 2006, <http://www.ynetnews.com/articles/0.7340.L-3218458.00.html>.

⁴⁷² See, e.g., Walid Salem, *Address the ‘Jewish Question’ Without Resorting to Propaganda*, THE DAILY STAR, Nov. 8, 2005, www.dailystar.com.lb/article.asp?edition_id=10&categ_id=5&article_id=19863#. Salem is the director of the East Jerusalem office of Panorama, the Center for the Dissemination of

undoubtedly, guarantees of safety, free travel, and the like would have to be extended to Jewish communities before they would feel safe and agree to stay in an Arab Palestine. The world has seemed to be rushing to create a Palestinian state on the assumption that such a state would decrease the level of Islamist terror that even the West, both the United States and Europe, have recently experienced. Whether this assumption is wishful thinking or not in terms of a decrease of Islamic terrorism against the West in general is beyond the realm of this paper, but it increasingly appears to be wishful thinking in terms of Palestinian acceptance of Israel.⁴⁷³

Indeed, the mere creation of a Palestinian state, without more, would not be a panacea. There are and must also be preconditions to such a state, not as a matter of theory or wishful thinking, but as a matter of reality. These conditions include the dismantling of terrorist organizations,⁴⁷⁴ the monopoly of force by a Palestinian police force, demilitarization,⁴⁷⁵ and economic viability.⁴⁷⁶ It is not simply a matter of acceding to Israel's interest or that of Jews who may be living in a Palestinian state. As even Adam Roberts, who is sympathetic to the Palestinian view of Israeli settlements has observed, "on the Palestinian side, the belief that self-determination is an internationally recognized right still sometimes involves a corollary reluctance ... to accept that there might be any obligation on Palestinians to demonstrate (to Arab states as much as to Israel) that a future

Democracy and Community Development. Sari Nusseibah, President of Al Quds University in East Jerusalem, is another key voice of moderation. See, e.g., Alan Cowell, *End to Boycott of Israeli Universities Is Urged*, N.Y. TIMES, May, 20, 2005, at A8; David Horowitz, *A Glimmer of Hope*, N.Y. TIMES, Mar. 10, 2004 at A27. Salem and Nusseibah differ from others, whose calls to integrate Jews into Arab society seem part of a strategy to advocate one multi-ethnic state, with Arabs in the majority, rather than two states.

⁴⁷³ See Zeev Schiff, *The Hope that Turned False*, HAARETZ, Dec. 9, 2005, <http://www.haaretz.com/hasen/spages/655822.html> ("In recent months, Israel has shown an openness that it has not displayed in the past: the disengagement from Gaza and evacuation of the settlements, the opening of the Rafah passage between Gaza and Egypt, and the agreement allowing European Union monitors at the passage. ... The response by the Palestinian gangs was to step up the Qassam rocket fire from northern Gaza... And who's among the shooters? Not only Islamic Jihad members, but also those belonging to Al Aqsa Martyrs Brigades of Fatah, Abu Mazen's organization.").

⁴⁷⁴ See Quartet Statement on Palestinian Legislative Council Elections, Dec. 28, 2005, http://www.un.org/news/dh/infocus/middle_east/quartet-28dec2005.htm ("those who want to be part of the political process should not engage in armed group or militia activities, for there is a fundamental contradiction between such activities and the building of a democratic state.").

⁴⁷⁵ See PM's Kadima to call for Demilitarized Palestinian state, HAARETZ DAILY, Nov. 28, 2005, <http://www.haaretzdaily.com/hasen/spages/651003.html>; Uzi Arad, *No Free Rides, Tangible Israeli Gains Required if Palestinian State is Established*, Oct. 12, 2005, [http://www.yetnews.com/Ext/Comp/ArticleLayout/CdaArticlePrint Preview/1,2506,L-31](http://www.yetnews.com/Ext/Comp/ArticleLayout/CdaArticlePrintPreview/1,2506,L-31)

⁴⁷⁶ This is undoubtedly why the World Bank and various donor countries are presently pumping almost a billion dollars into Gaza after Israel's disengagement from that territory. See *Aid for Gaza Aimed to Jump Start Economy*, THE DAILY STAR, Oct. 12, 2005, www.dailystar.com. See also *infra*, notes 485-92 and accompanying text.

Palestinian state would be a stable and responsible member of international society, accepting frontiers, regimes and rules of coexistence.”⁴⁷⁷ A recent suggestion by Amnon Rubinstein, the founder of Shinui – one of Israel’s most liberal parties and the present dean of one of Israel’s law schools – is that in the absence of a control of the violence, a new mandate be established for the West Bank under the trusteeship of either the European Union or Jordan (with Egypt having the trusteeship for the mandate over Gaza), with Palestinian sovereignty held in abeyance.⁴⁷⁸

The military, political and economic conditions interrelate. Apart from the Arab-Jewish question, the lack of a monopoly of force in the governing authority threatens the very existence of that governing authority and the population it governs.⁴⁷⁹ A failure to rid the territory that becomes the Palestinian state of various forces “contributes to the anarchy in Palestinian society, to gangland rule”⁴⁸⁰, that is, it makes the creation of a civil state nearly impossible.⁴⁸¹ As the London Telegraph recently editorialized, “Mahmoud Abbas’s chronic inability to contain Palestinian violence...has serious implications both for democracy in the areas under Palestinian authority and for relations with Israel. A man ... unable to keep his side of the bargain in the peace talks is failing those he governs...”⁴⁸² Private investment necessary for economic revival will be difficult in the context of a general state of lawlessness.⁴⁸³ Of course, a corollary of

⁴⁷⁷ Roberts, *supra* note 200, at 78-9.

⁴⁷⁸ See Amnon Rubinstein, *Mandate for Palestine*, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1134309653376&pagename=JPost%2FJPArticle%2FShowFull> (updated Dec. 27, 2005).

⁴⁷⁹ See, e.g., Khaled Abu Toameh, *Execution Spree in Gaza*, THE JERUSALEM POST, Aug. 2, 2004, <http://www.jpost.com/servlet/Satellite?pagename=Jpost/JPArticle/Printer&cid=1091416708>; Ibrahim Barzak, *Fatah gunmen clash with Palestinian police*, BOSTON GLOBE, Mar. 21, 2006, at A10.

⁴⁸⁰ Zeev Schiff, *The Hope that Turned False*, HAARETZ, Dec. 9, 2005, <http://www.haaretz.com/hasen/spages/655822.html>.

⁴⁸¹ See, e.g., Barry Rubin, *Palestinian Politics*, TURKISH DAILY NEWS, Nov. 25, 2005, www.turkishdailynews.com.tr/article.php?enewsid=29289 (describing the “anarchy and continuing cult of violence” that makes political progress impossible). Aaron Miller, an advisor to six presidents on the quest for Middle East peace, concurs: “Armed struggle as a tactic has been a disaster. ... [T]he gun has also wreaked havoc on the Palestinian society and image. Suicide terrorism has not only alienated Israel and America but also pushed them closer together. And without Israel and America, a Palestinian state will be stillborn.” <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/23/AR2006012301256.html> (last viewed Jan. 24, 2006).

⁴⁸² Editorial, *Democracy in Palestine*, Dec. 30, 2005, <http://www.telegraph.co.uk/opinion/main.jhtml?sessionid=ELQTRLBWAKJ4BQFIQMGCFF4AVCBQUIV0?xml=/opinion/2005/12/30/dl3002.xml&sSheet=/news/2005/12/30/ixnewstop.html>.

⁴⁸³ The lack of investment in Gaza since the withdrawal of Israeli settlers and soldiers has been ascribed to lawlessness, perceived corruption in the Palestinian Authority, and the lack of border outlets for exports. See Harvey Morris, *Palestinians Grow Frustrated Waiting for the Expected Economic Recovery*, Nov. 29, 2005, <http://news.ft.com/cms/s/262b2110-607d-11da-a3a6-0000779e2340.html>; Steven Erlanger, *As*

centralization of force and police-keeping in a Palestinian central government is that Jews also must be barred from militia-like activity and, for that matter, bearing unauthorized arms. To some settlers, this might be anathema⁴⁸⁴, but that would be a condition to their remaining within a Palestinian state.

Another condition for the creation of a Palestinian state must be that it would be economically viable. Otherwise, there can be little doubt that rather than constituting an answer to the scourge of terrorism, that state would become another and important base for it. And, for the foreseeable future, there seems little doubt that to be economically viable, large numbers of Palestinians – arguably in excess of 100,000⁴⁸⁵ – would have to come into Israel to work every day, as they did prior to the first and second *intifadas*.⁴⁸⁶ The most recent World Bank report calculates unemployment in the West Bank at 28 percent, with approximately 57 percent of workers receiving

Sharon Ails, *Palestinians Face Own Travails*, N.Y. TIMES, Jan. 8, 2006, <http://www.nytimes.com/2006/01/08/international/middleeast/08palestinians.html?pagewanted=2> (“The combination of the security chaos in Gaza and in large parts of the West Bank ... is likely to drive off foreign investors... Yet it is only investment and job creation that can offer enough jobs for the growing population of young men.”).

⁴⁸⁴ Zeev Schiff has described certain settlers as “right wing anarchists”, originally armed for their self-protection, who “have been involved in an entire slew of illegal and violent activities against the Palestinians in recent years, among them beatings and stealing their olive crops.” See Zeev Schiff, HAARETZ, Nov. 18, 2005,

<http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=647209>.

⁴⁸⁵ See World Bank Report, *Long-Term Policy Options for the Palestinian Economy*, summarized in West Bank and Gaza Update, Dec., 2002, http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000160016_20030814165921.

⁴⁸⁶ The World Bank estimates the number at almost 150,000 in mid-2000 prior to the recent intifada. See *The Palestinian Economy and the Prospects for its Recovery, Economic Monitoring Report to the Ad Hoc Liaison Committee*, Number 1, Dec. 2005, p. 6 available at <http://siteresources.worldbank.org/INTWESTBANKGAZA/Data/20751555/EMR.pdf>; Associated Press, *Israeli Aircraft fire on Gaza Rocket Labs*, N.Y. TIMES, <http://www.nytimes.com/aponline/international/AP-Israel-Airstrikes.html> (“The entry of Palestinian laborers into Israel has been severely restricted during the past five years in response to violence, dealing a crushing blow to the Palestinian economy”); Associated Press, *UN report: Poverty rising in Palestinian areas, Despite Cease-Fire*, HAARETZ DAILY, <http://www.haaretzdaily.com/hasen/spages/655553.html> (last update 12/8/95) (the UN Office for the Coordination of Humanitarian affairs reported that “the unemployment rate is three times higher than what it was before fighting broke out in late 2000”, citing “continued Israeli closures and other travel restrictions as drags on the economy. During spikes in violence, Israel restricts Palestinian movement to stop militants from launching attacks.”); Akiva Eldar, *U.S. to Israel: Gaza convoys must start this week*, HAARETZ, <http://www.haaretz.com/hasen/spages/656089.html> (last updated Dec. 11, 2005) (“[A] new report prepared by the World Bank ... attributed most of the PA’s economic problems to various movement restrictions imposed by Israel, including limitations on the number of Palestinians working in Israel.”). While Hamas leaders – at least prior to forming their new government – have stated that they want an economy independent of Israel (See Orly Halpern & AP, *Hamas Plans Independent Economy*, THE JERUSALEM POST, Feb. 9, 2006, <http://www.jpost.com/servlet/Satellite?apage=1&cid=1139395371192&pagename=JPost%2FJPostArticle%2FShowFull>, accomplishing that goal presently seems remote and more reflective of their anti-Israel political stance than objective economic reality.

wages below the poverty line.⁴⁸⁷ An extraordinarily high unemployment rate raises serious questions about whether a state at peace with its neighbors can be created, especially one that lacks the oil resources of some of the other Arab nations. One analyst at the World Bank, researching policy options for the West Bank as well as Gaza, after citing the fact that “Palestinians earn 91% more in Israel than in WBG [the West Bank and Gaza]”, concluded that “it is paramount for WBG [the West Bank and Gaza] to maintain access to Israel’s labor market, irrespective of the trade policy between Israel and WBG.”⁴⁸⁸ Recent economic studies of the Arab Middle East reveal very high unemployment rates throughout the Arab Middle East,⁴⁸⁹ making it unlikely that Palestinian excess labor could be absorbed by other Arab states, even assuming a willingness to do so.

Aside from employment within Israel, open or relatively open borders are necessary for the export of goods from those industries that exist or are created within such a state.⁴⁹⁰ As the World Bank reports, “All Palestinian trade flows to or through Israel: for the small trade-dependent Palestinian economy, therefore, the smooth operation of bilateral passages between Gaza, the West Bank and Israel is essential.”⁴⁹¹ It may be possible to separate Israel and the Palestinians politically, but an economic separation will take many, many years.⁴⁹²

⁴⁸⁷ Akiva Elder, *UN report: Joblessness and Poverty on the Rise in Territories*, HAARETZ, <http://www.haaretz.com/hasen/spages/657006.html> (last updated Dec. 13, 2005).

⁴⁸⁸ Maurice Schiff, *Trade Policy and Labor Services, Final Status Options for the West Bank and Gaza*, World Bank Development Research Group, Trade, Policy Research Working Paper 2824, p.26 (April 2002), available at http://wdsbeta.worldbank.org/external/default/WDSContentServer/TW3P/IB/2002/05/14/000094946_0205010411325/Rendered/PDF/multi0page.pdf. While another World Bank Report has argued in favor of greater economic separation “aimed at diversifying the Palestinian economy away from Israeli dependence in favor of greater integration with global markets,” even this report acknowledges that “this scenario is associated with significant unemployment. Long Term Policy Options for the Palestinian Economy at 5-6.

⁴⁸⁹ See Dr. Nirod Raphaeli, *Unemployment in the Middle East – Causes and Consequences* (MEMRI Inquiry & Analysis – Economic Studies No. 265), Feb. 10, 2006, <http://memri.org/bin/latestnews.cgi?ID=IA26506> (While International Labor Organization figures report an unemployment rate for the Middle East and North Africa of 13.2% -- even higher than sub-Saharan Africa, the poorest region in the world, the Arab League Economic Unity Council estimates an even higher unemployment rate of 20 percent among the members of the Arab League).

⁴⁹⁰ Analogously, when Israel, based upon its stated security concerns, closed the entrances to Gaza, James Wolfensohn scolded Israel for strangling Gaza’s economy. Wolfensohn, former president of the World Bank, presents serves as an emissary of the United States, Russia, the UN, and the European Union to oversee the use of donor funds in the economic development of Gaza. See Greg Myre, *Envoy in Mideast Peace Effort Says Israel Is Keeping Too Tight a Lid on Palestinians in Gaza*, N.Y. TIMES, Oct. 25, 2005 at A12.

⁴⁹¹ World Bank Dec. ’05 Report, *supra* note 129 at 11.

⁴⁹² This is essentially the point that David Brooks is making with respect to a general Israeli policy of “disengaging” from the Palestinians. Disengagement, according to Brooks, is “not an option because while Israelis may no longer be dependent on the Palestinians, the Palestinians remain dependent on them.” David Brooks, *What Palestinians?*, N.Y. TIMES, Nov. 17, 2005 at A31.

In what way do these economic *data* bear on the question of whether it would be pragmatic to pursue the continuance option? *The only circumstances under which it would be safe for Israel to accept huge numbers of Palestinians every day for employment and exports from industries within Palestine, without fear of terror, are the same circumstances under which it should be safe for Jews to live in a Palestinian state.* The exact nature of the guarantees of safety and rights need not be spelled out here, but the presence of Israel with its armed forces nearby ready and willing to protect endangered Israeli Jews living close by can be a spur to a truly open and therefore civil Palestinian society. And if this kind of society is not what the Palestinians desire and, if permitted, design as their state, there is little reason to allow such an independent state. As two observers of Palestinian society have written, “A peace agreement can only successfully end a conflict if it enjoys underlying, wide-ranging support from its respective populations.”⁴⁹³

Moreover, the question of whether Jews should be allowed to stay in their communities in land that is part of what they consider *Eretz Y’srael*, the land of Israel, even if not *medinat Y’srael*, should be one that such communities should be allowed to make. Under the right circumstances, just as Israeli Jews live in New York, Los Angeles and Boston, these same Jews might well decide, for religious and other reasons, to remain. It should be their choice.

V. Conclusion

Two narratives indeed compete.⁴⁹⁴ According to one, the Palestinian Arabs were “there” first, the Jews came and, as imperialists or colonists, “took” the Arab land and displaced the native population.⁴⁹⁵ But blind

⁴⁹³ Weiner & Sussman, *supra* note 466.

⁴⁹⁴ For an example of one of these narratives, this one favorable to Israel, *see, e.g.*, Charles Moore, *How did We Forget that Israel’s Story is the Story of the West?*, <http://www.opinion.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2005/11/26/do2602.xml&sSheet=/opinion/2005/11/26/ixopinion.html>. For an example of how the competing narratives, because they may be relevant to present perceptions of rights, vie even in the field of archaeology, *see* Scott Wilson, *A Dig Into Jerusalem’s Past Fuels Present-Day Debates*, WASHINGTON POST FOREIGN SERVICE, Dec. 2, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101944_pf.html (with respect to the possible find of King David’s palace in Jerusalem by an Israeli archaeologist, [w]hether David was a tribal chieftain or visionary monarch matters deeply to the Jewish historical narrative...Palestinian leaders ... dismiss the ancient story as politically useful fiction.”) An official organ of the Palestinian Authority terms a Jewish nexus to Jerusalem as an “fabricated heritage.” *See* Palestinian National Authority State Information Service International Press Center, *Israel Funds Construction Acts Beneath Al Aqsa Mosque at the Cost of 68 Million*, Dec. 13, 2005, http://www.ipc.gov.ps/ipc_new/english/details.asp?name=12400.

⁴⁹⁵ For several different versions of this narrative, *see supra* notes 84-91 & 98-105 and accompanying texts.

acceptance of this narrative, intentionally in the case of some commentators⁴⁹⁶, completely obliterates even the affirmative elements of the Jewish narrative that relate the several millennia connection between the land that Jews referred to as *Eretz Y'srael* (the Land of Israel) and the Romans renamed *Palaestina* in an effort to sever that connection. According to Ephraim Karsh, “[s]o successful has this misrepresentation of the historical truth [the narrative that portrays “Israel as an artificial neo-crusading entity created by Western imperialism”] been that what began as propaganda has become conventional wisdom, with aggressors portrayed as hapless victims and victims as aggressors.”⁴⁹⁷

The Palestinian narrative has now become dominant,⁴⁹⁸ and it is probably that narrative’s unquestioned and uncritical acceptance, rather than particular arguments or claims made and addressed above, that most accounts for the near universal acceptance of the proposition that, in any final peace deal between Israel and a Palestinian political authority (whether *the* Palestinian Authority, or not) all Jewish settlements would have to be abandoned. Indeed, if one adopts all aspects of that narrative, then acceptance of the Jewish State of Israel is simply a concession to a present geo-political reality rather than an acknowledgement that Jews, too, have rights. Conscious suspension rather than acceptance of those parts of the Palestinian narrative that deny any nexus between Jews and the land would

⁴⁹⁶ For an example of such blind acceptance, see *Justin Keating on Israel*, THE DUBLINER, Nov. 2005, www.honestreporting.com/a/dublinerarticle.htm (“...Zionists have absolutely no right in what they call Israel, ... they have built their state not beside but on top of the Palestinian people, and ... there can be peace as long as contemporary Israel retains its present form.”).

⁴⁹⁷ KARSH, *supra* note 36.

⁴⁹⁸ See Letter from Walter Reich, *supra* note 101. In addition to describing most elements of both narratives, Reich observed: “With regard to the “narrative” of the Israeli-Palestinian conflict following the establishment of Israel in 1948, until a few decades ago the American and European narrative was, in the main, one that was favorable toward Israel. This “narrative,” or story, was that of a justifiable, necessary and heroic return by Jews to their homeland. ... The public’s understanding of the conflict and its background has changed in recent decades, and in some ways radically. More and more, the Palestinian ‘narrative’ has affected the way in which the Israeli-Palestinian conflict is presented in the media – in newspapers, television and film – and has, as a result, affected the way in which the public understands it.” An illustration of this dominance was the Golden Globe award of Best Foreign Film to “Paradise Now”, a film about Palestinian suicide bombers. David Germain, Associated Press, ‘*Brokeback Mountain*’ Get 4 Golden Globes, WASH. POST, Jan. 16, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/16/AR2006011600352.html>. While the film is not supportive of suicide bombing, it adopts the Palestinian narrative and, in the words of the filmmaker, “tr[ie]s...to explain why two seemingly simple garage mechanics would be willing to kill themselves and others.” Reuters, *Palestinian Film on Suicide Bombers wins Golden Globe*, HAARETZ, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=671378> (last updated Jan. 17, 2006). See also Gerald M. Steinberg, *Funding NGOs is no Solution*, THE JERUSALEM POST, Feb. 11, 2006, <http://www.jpost.com/servlet/Satellite?cid=1139395389604&pagename=JPost%2FJPArticle%2FShowFull> (describing how many of the NGO’s “repeat the Palestinian version of history that labels Israel as ‘colonialist’”).

allow for a more critical examination of the assumption that Israeli Jewish settlements must be completely absent from the territory to be included within a Palestinian state. The challenge is to move beyond political narratives to deal with both the reality and desirability of Jewish settlements on the West Bank. To what degree should the presence of Jewish settlements affect the final boundaries of Israel *vis a vis* a nascent Palestinian entity? Must the Palestinian state be free of Jews?

The presence and location of Jewish settlements surely should and will influence the ultimate boundary between Israel and a Palestinian state. If the *raison d'être* of Israel is that it is a Jewish albeit democratic state, its Jewish majority should not be threatened by an Arab minority that has a realistic chance of becoming a majority. Israel as a haven for Jews around the world will have disappeared. The approximately 20 percent of Israel's present population that is Arab does not so threaten Israel's Jewish character. Similarly, if the *raison d'être* of a future Palestinian state is to provide a political sovereignty for Arabs who identify themselves as Palestinians, whether or not they reside in that state, Palestine's Arab identity should not be threatened by a Jewish minority that would become a majority. Two conclusions flow from this construct.

The first of these is that, indeed, some Jewish settlements like Maale Adumim that are contiguous or substantially contiguous to the 1967 borders of Israel will surely remain part of Israel in any final settlement⁴⁹⁹, with land swaps most likely in the area of the Negev that would broaden the waist of Gaza in return. This was basically Prime Minister Ehud Barak's offer at the 2000 summit at Camp David with Chairman Yasir Arafat and in the negotiations that followed. And, even some of the most pro-Palestinian Israeli politicians, like former Foreign Minister Yossi Beilin, now one of the heads of the Meretz party, acknowledge the need for border adjustments that would integrate into Israel settlements that border on the old armistice lines of Israel and house close to 80 percent of the approximately 250,000 settlers on the West Bank.

The second conclusion is that the remainder of the settlements and the Jewish settlers there, including those in the Hebron area, need not be the obstacle to a peace settlement that is commonly portrayed. Even if close to 100,000 settlers remain (a rather high estimate, if major settlement blocs

⁴⁹⁹ While it seems clear that Jewish settlements in the Hebron area, if they are to remain, would become part of Palestine, and a settlement such as Maale Adumim, on the outskirts of Jerusalem would be incorporated within Israel, the fate of many settlements fall seems not straightforward. See Mathew Gutman, *Beit Arieah won't be Abandoned – Sharon*, Nov. 9, 2005, THE JERUSALEM POST, <http://www.jpost.com/servlet/Satellite?cid=1131367050883&pagename=JPost%2FJPArticle%2FShowFull>.

contiguous to the Green Line are incorporated into Israel in exchange for other Israeli land), that number would probably constitute no more than 2 percent of the population of such a Palestinian state and probably less. The land area of those settlements would constitute considerably less than 2 percent of the land under Palestinian sovereignty.

Let us return to the African-American analogy tendered at the beginning of this article. Most Americans, especially liberal Americans, would never think that the solution to conflict within a predominantly white-ethnic neighborhood, whether Irish, Italian or other, if an African-American family moved into it would be to remove the African-American family. Rather, substantial resources would be devoted to insuring that the neighbors respect the new inhabitants. Instead of reiterations of the assumption that the settlements are an obstacle to peace, thought and resources should be devoted to a serious discussion of the context and conditions under which Jews might continue to live on the West Bank. While both reason and justice support the creation and co-existence of two states west of the Jordan River, neither justice nor other reason is served by requiring that one of these states be free of Jews.